IN THE CIRCUIT COURT OF OHIO COUNTY
WHEELING, WEST VIRGINIA

IN RE:
TOBACCO LITIGATION CASE NO. 00-C-6000
MEDICAL MONITORING CASES

* * *

JURY TRIAL

Whereupon the above-entitled matter came on for hearing before the Honorable Arthur M. Recht at the Ohio County Courthouse, Wheeling, West Virginia, and the proceedings are as follows.

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VOLUME 13-A

October 4, 2001

9:00 a.m.

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Thursday Morning Session
October 4, 2001
9:00 a.m.
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P R O C E E D I N G S
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(In open court with a jury present.)
THE COURT: All right. Be seated, please. Good morning.
MR. SEGAL: Good morning, Your Honor.
THE COURT: All right. Mr. Furr.
MR. FURR: Thank you, Your Honor. Good morning, ladies and gentlemen.
-- -- --
DAVID MICHAEL BURNS, M.D.,
being first duly sworn by the Clerk, testifies and says as follows:
-- -- --
CROSS-EXAMINATION (Con't)
BY MR. FURR:
Q. Good morning, Dr. Burns.
A. It's a little cooler today than yesterday. This temperature is a little easier to work

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with, you are right.
Q. Dr. Burns, let's start by talking a little more about how screening tests are evaluated. Sir, isn't it correct that it is the National Cancer Institute's position that the gold standard for evaluating screening tests, cancer screening tests, is whether those tests have been shown to reduce the likelihood of dying from cancer?
A. Yes, that is their position.
Q. Okay. And sir, if I were to represent to you that Dr. Gupta from West Virginia University testified that that is his position also, that wouldn't surprise you, would it, sir?
A. No, it would not.
Q. Because traditionally that has been the position as to how to evaluate cancer screening tests; correct?
A. That has been the gold standard, that's correct.
Q. That's the gold standard.
Now, sir, we talked yesterday about the fact that there are studies ongoing on the use of spiral CTs to screen for lung cancer; correct?
A. That's correct.

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Q. You said there is a study going on at the Mayo?
A. That's correct.
Q. At the Moffitt?
A. Yes.
Q. And in foreign countries such as, I think we said, Germany, Israel, Japan; correct?
A. That's correct.
Q. Now, sir, am I correct that you would agree with me that, if those studies in fact show that individuals who undergo cancer, lung cancer screening with spiral CTs have no different disease outcome relative to lung cancer than individuals who do not undergo that screening or who are diagnosed when they become symptomatic, that that would suggest that screening with spiral CTs is inappropriate?
A. That would suggest that the technique that was used was not successful in accomplishing the goal for which -- to reduce mortality, that's correct.
Q. And that would suggest that screening with that technique is inappropriate; correct?
A. "Inappropriate" is perhaps the wrong word,

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but it would not be effective, that's correct.
Q. Okay. I don't want to quibble, sir, but didn't you one time tell me -- excuse me, didn't you tell a lawyer in the Scott case that that would not be appropriate if those results were obtained?
A. If it's effective. If it's not effective, it wouldn't be appropriate to put it in place, that's correct.
Q. Okay. And let's make sure we all know where we are today. The fact is that, today, screening for lung cancer with spiral CT scans has not been shown to reduce the likelihood of dying from lung cancer; correct?
A. That's correct.
Q. In fact, sir, you believe that the type of data needed to evaluate that question should be obtained, don't you?
A. I do.
Q. Okay. In fact, that's what the National Cancer Institute is planning to do, isn't it?
A. The National Cancer Institute -- yes, the National Cancer Institute is conducting a study to obtain mortality data that's not exactly the data that I think would be useful. But they certainly

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are intending to conduct a gold standard trial to obtain mortality data, that's right.

Q. Okay. When we broke yesterday, sir, I had handed you a new article from a scientist at the National Cancer Institute; is that correct?

A. That's correct.

Q. Did you have an opportunity to review it last night?

A. I did.

Q. Are you prepared to answer some questions about it now?

A. I certainly am.

MR. FURR: Jason, could we please bring that article up? Could you zero in on the title and author, please.

BY MR. FURR:

Q. The title of this paper is lung cancer screening: An update, by Pamela M Marcus; is that correct?

A. That's correct.

Q. If we go to the bottom to see when it was published. This article was published in the Journal of Clinical Oncology, September 15th, just a couple weeks ago; correct?

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A. That's correct.
MR. FURR: Could we go to the abstract, Jason, first paragraph.
BY MR. FURR:
Q. Two prominent and timely issues in lung cancer screening are discussed in this article. First, findings from extended mortality follow-up of participants enrolled as part of the Mayo Lung Project are reviewed. These findings suggest that overdiagnosis -- the identification, through screening, of clinically unimportant lung cancer lesions -- may occur when screening for lung cancer. Second, the question of whether sufficient evidence exists to advocate mass lung cancer screening with low-radiation-dose spiral computed tomography, CT, is discussed. Given the absence of lung cancer mortality data for spiral CT, it is concluded that such activities should not be advocated at this point in time. The lung screening study, an ongoing randomized controlled trial of lung cancer screening with spiral CT, also is described.
All right, sir. I read that correctly, didn't

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I?
A. You did.
Q. That's the abstract section of that paper; is that correct?
A. That's correct.
Q. Which is also analogous to being the summary of that paper; correct?
A. That's correct.
MR. FURR: All right. Could we have the first paragraph, Jason?
BY MR. FURR:
Q. The question of lung cancer screening dates back to the 1950s, a time when rising lung cancer incidence and mortality rates indicated a need for intervention. Small uncontrolled studies of chest imaging conducted during the 1950s and '60s did not suggest a reduction in lung cancer mortality with screening, but more data were necessary to conclusively rule out any benefit. The National Cancer Institute, NCI, sponsored three large randomized controlled trials, R CTs, during the 1970s and '80s, but no reduction in lung cancer mortality was observed with varied regimens of chest

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x-ray and sputum cytology. Although these studies had a number of shortcomings, they nevertheless have been central in shaping lung cancer screening policy in the United States for the last 25 years.

Did I read that correctly, sir?

A. Yes, you did.

Q. And what is being discussed there is the fact that the use of chest x-rays has been researched -- excuse me, was researched through three large randomized controlled trials during the '70s and '80s; correct?

A. That's correct.

Q. Okay.

MR. FURR: Could we have the next highlight, Jason?

BY MR. FURR:

Q. The lung screening study: An RCT of spiral CT as a lung cancer screening modality.

The most effective and least biased manner in which to obtain information regarding whether a screening modality can reduce cancer mortality is through an RCT?

Did I read that correctly, sir?

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A. Yes.
Q. And an RCT is the randomized controlled trial we have been talking about; is that correct?
A. That's also correct.
Q. Could we have the next paragraph, please?
Although a number of RCTs of lung cancer screening are being planned, there appears at this point in time to be only one in progress: The lung screening study, or LSS. The LSS is administered by the Division of Cancer Prevention of the NCI.
Did I read that correctly, sir?
A. Yes, you did.
Q. And that's a reference to the ongoing study at the National Cancer Institute; correct?
A. That's correct.
MR. FURR: Could we have the next paragraph?
BY MR. FURR:
Q. Phase I of the LSS began in September of 2000 and will conclude in August of 2001. Phase I assessed the feasibility of enrolling participants on to a randomized study of CT, a study in which participants had only a 50 percent chance of receiving that examination.

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Did I read that correctly, sir?
A. Yes, you did.
Q. That's a reference to the first phase of the study that you and I have been discussing in which the NCI was evaluating whether to undertake a full scale RCT; correct?
A. That's correct.
MR. FURR: Could I have the next section, please?
BY MR. FURR:
Q. Phase II of the LSS is currently in the planning stages. At this point in time, formal approval from NCI's executive committee has not been received; therefore, details may change. The present plans for Phase II are to enroll, in a one-year period, another 12,000 persons at elevated risk of lung cancer and to provide all 15,300 participants with three annual screens. Randomization will continue: Half the participants will receive CT, while the other half will receive chest x-ray. Phase II activities are slated to begin by October of 2001, and given that start date, screening activities would be scheduled to end in early

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2005. The LSS, at that point in time, would have appropriate statistical power to assess whether the reduction in lung cancer mortality with annual spiral CT screening is at least 50 percent.

Did I read that correctly, sir

A. You did.

Q. And that is a description of this gold standard study that the NCI is contemplating doing; correct?

A. It is a description of that study.

Q. Okay.

MR. FURR: Could we have the next excerpt, please?

BY MR. FURR:

Q. In conclusion, cancer screening is a complex issue.

Stop there, please. By the way, you wouldn't disagree with that, would you, sir?

A. No.

Q. Okay. Keep going.

Cancer screening uses substantial healthcare resources. False positive tests result in unnecessary anxiety as well as

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unnecessary and sometimes risky diagnostic procedures. Identification of lesions with little to no clinical relevance creates similar, as well as more ponderous, conditions.

The unfortunate truth is that cancer screening will always result in harm, harm that would never have occurred in the absence of screening. Whether benefit outweighs the harm is of the utmost importance when evaluating screening modalities. For these reasons, it is critical that spiral CT be thoroughly evaluated before establishment of mass screening programs.

Did I read that, correctly, sir?

A. You read that correctly.

Q. And what that is is an explanation of the thinking behind why NCI needs to conduct this gold standard randomized control trial that we have been discussing; correct?

A. That's correct.

Q. All right. Now, Dr. Burns, yesterday we spoke about the U.S. --

MR. FURR: Could I have the blue book?

BY MR. FURR:

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Q. -- the report of the U.S. Preventive Services Task Force with respect to its recommendations regarding lung cancer; correct?
A. Yes, we did.
Q. And I mentioned to you that the task force, as I'll call it, periodically updates its screening recommendations on its web site; correct?
A. Yes, you did.
Q. Okay. Did you do your homework and look at the web site last night?
A. I most certainly did. Spent considerable time looking for it.
Q. That's a fair way to put it, sir, because, in fact, the task force has chosen not to update its recommendations with respect to screening for lung cancer or COPD in asymptomatic smokers, has it?
A. I don't believe that is a correct statement.
Q. Isn't it correct that the task force convened a special meeting in fall of 1999 after the Henschke report in July of 1999 and discussed whether or not to move up the priority of updating the task force guidelines on lung cancer screening?
A. I have no idea whether they did or didn't.

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Q. You simply don't know?
A. I don't know whether they held that meeting. I do know what it said on the web site, which was that, as soon as they had completed their review of each of the issues and formed a judgment, they would post that on the web site.
Q. Sir, isn't it true that the --
A. They will certainly update the information that they have on lung cancer screening when the new issue comes out next year. They simply have not completed that process or at least not completed it to the point where they are willing to post it on the web site.
Q. Sir, isn't it true that the task force concluded that no updating was needed because the Henschke data are insufficient?
A. I do not know what they concluded because they have not posted it.
Q. I take it you have never spoken to Dr. Atkins, the coordinator of the task force recommendations?
A. Not to my knowledge.
Q. Okay. Dr. Burns sir, isn't it correct that you are willing to recommend that these tobacco

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companies be forced to pay for screening tests that you know will not be helpful to smokers?

A. No.

Q. All right. Well, sir, let's take a look at what you have recommended over time that these companies be forced to pay for with respect to screening tests and whether you knew that those tests would make no difference in disease outcome for smokers.

Now, as we just read in the Marcus article, using chest x-rays to screen for lung cancer has been extensively studied since the 1970s; correct?

A. That's correct.

Q. And the information that was gathered demonstrated no difference in disease outcome for individuals who received chest x-ray compared to individuals who did not undergo screening or who were diagnosed symptomatic; correct?

A. That's not quite correct. They demonstrated no difference in mortality rates.

MR. FURR: Okay.

Well, may I have the Scott deposition, 11-1, Alecia?

Let me take a look at something, Dr. Burns.

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This is November 10th, Alecia. May I have 11-1? Thank you. Sorry, excuse me.

May I approach, Your Honor?

THE COURT: Yes.

BY MR. FURR:

Q. Dr. Burns, take a look at that and verify for us that that's a copy of your deposition that was taken in the Scott case on November 1st of the year 2000?

A. I assume that that's true.

Q. Let me ask you to turn to Page 100, please, sir, beginning at Line 16 and going over to Page 101, Line 7.

MR. FURR: Could we have that up, Jason?

BY MR. FURR:

Q. Sir, isn't it true during your Scott deposition, you were asked:

And if the data revealed, both at the five-year level and at a ten year follow-up, no decrease in overall mortality from lung cancer, would that impact your opinion on the desirability of a spiral CT screening?

And your answer was: I think that depends on the construct of the data. If there

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was demonstration that the individuals who underwent screening had no different disease outcomes relative to lung cancer than individuals who did not undergo the screening or individuals who were diagnosed symptomatically, then I think that that would, would interfere or would suggest that screening was not appropriate.

That's the kind of information that was provided for chest x-rays as a screening tool that created much of the existing recommendation against screening.

Did I read that correctly, sir?

A. Yes, you do.

Q. Okay. And in that answer you referred to disease outcomes, didn't you?

A. I did, sure.

Q. Okay. Dr. Burns, am I correct that, at least as early as 1990, you knew that early detection of lung cancer with chest x-rays was not helpful and did not result in an improvement in mortality?

A. The answer to the first part of your question is that that statement is not correct.

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The answer to the second part is yes, it is correct.

Q. Okay. I'm not sure I can sort that out so let's look at your deposition.

MR. FURR: Could I have the Cimono deposition. This is from January 23 of 1990. Thank you.

May I approach, Your Honor?

THE COURT: Yes.

BY MR. FURR:

Q. Dr. Burns, I know there have been a lot of depositions, but do you recall a deposition in the Cimono case in 1990, the Eastern District of Texas?

A. I do.

Q. Now, that was an asbestos case, wasn't it, sir?

A. I believe it was.

Q. Let me ask you to turn to Page 9, Line 17.

MR. FURR: Can you pull that up, Jason.

BY MR. FURR:

Q. Dr. Burns, am I correct that you were asked the following question:

Would you agree that early detection is important in attempting to cure lung cancer?

And your answer was: That has been

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studied repetitively, and unfortunately, early detection does not prove helpful. We always, as a general principle however, like to identify cancers as soon as possible.

But in the screening studies that have been done in an attempt to identify lung cancers early, one can indeed identify the lung cancers early, but it does not result in an improvement in mortality.

Was that your testimony, sir?

A. Yes, that's correct.

Q. And that was your testimony in 1990; right?

A. That's correct.

Q. Now, to be clear, sir, the screening test that you reference in that answer are, of course, the randomized controlled trials of chest x-rays that we just looked at in the Marcus study; is that correct?

A. That's correct.

Q. All right. Stated a different way, sir, I also want you to assume that, on Tuesday, now, Dr. Gupta came here and told the jury that screening with lung -- that screening for lung cancer with chest x-rays has not been the standard of care for

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decades in West Virginia. That testimony wouldn't surprise you, would it, sir?
A. No, it would not.
Q. You would have no basis to disagree with that?
A. No, I would not.
Q. Okay. Now, against that background, sir, isn't it true that in, 1994 in the Castano case, that you were recommending that these companies be forced to pay for screening with chest x-rays?
A. That's correct.
Q. Okay. And isn't it true that, in 1996 in the Barnes case in Pennsylvania, that you were recommending that these companies be forced to pay for screening with chest x-rays?
A. That's correct.
Q. Isn't it true that, in 1997 in the Chamberlain case in Ohio, that you were recommending that these companies be force to pay for screening with chest x-rays?
A. As I said, I don't remember that case specifically, but it certainly would be something I would have recommended, yes.
Q. That would have been consistent with your

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practice, wouldn't it, sir?
A. Yes.
Q. Isn't it true that, in March of 1999 in Brown in California, you were recommending that these companies be forced to pay for screening with chest x-rays?
A. That's correct.
Q. And in fact, also in 1999 in this case, Blankenship, you were recommending that these companies be forced to pay for screening with chest x-rays; correct?
A. That's correct.
Q. In fact, in the year 2000 in this case, you were still recommending that these companies be forced to pay for screening with chest x-rays, weren't you?
A. That's correct. Chest x-rays or newer technology as it developed.
Q. But your recommendations including forcing these companies to pay for screening with chest x-rays; isn't that correct?
A. That's correct.
Q. Now, isn't it true, sir, that, although you recommended chest x-rays in this case as late as

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April of 2000, that, in May of 2000, one month later, in the Scott case, you wrote that screening with chest x-rays and sputum cytology has not been shown to improve long-term survival and, therefore, major medical groups have not recommended screening for detection of lung cancer?

A. Certainly.

Q. Okay. Thank you.

Dr. Burns, I want to put back up the board I used in opening statement and that Mr. Segal asked you some questions about yesterday, sir.

A. Okay.

Q. Titled "Public Health Recommendations, Medical Monitoring for Healthy Smokers." Do you remember that board, sir?

THE COURT: Can you all see that?

BY MR. FURR:

Q. Do you remember that, sir?

A. I do.

Q. Now, we've talked about the National Cancer Institute, haven't we?

A. We have.

Q. The American Cancer Society is one of the leading authorities on screening for lung cancer,

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isn't it?
A. That's correct.
Q. And isn't it true, sir, that the American Cancer Society does not recommend mass screening with spiral CTs for asymptomatic smokers?
A. That's correct.
Q. Okay. Instead, what the American Cancer Society recommends is that smokers should be counseled to quit smoking; right?
A. They certainly recommend that, that's correct.
Q. Okay. Let's talk about the United States Surgeon General. You talked a great deal with Mr. Segal yesterday about the Surgeon General's office, and you and he piled all those reports up on the desk up there. Do you recall that, sir?
A. I recall that.
Q. You said that you participated in the writing or reviewing of 18 of those, I think?
A. That's correct.
Q. And that there have been 27 all together since the first report in 1964?
A. 26 or 27 depending upon how you do the count, that's correct.

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Q. Isn't it true, sir, that not a single one of those Surgeon General reports recommends that smokers be screened with a test and as you are recommending in this case?
A. That's correct. None of them address the screening issue.
Q. Okay. We have talked about the U.S. Preventive Services Task Force a few minutes ago; is that correct?
A. That's correct.
Q. Obviously they don't recommend that smokers receive the type of screening that you are recommending in this case; correct?
A. They did not as of 1996, that's correct.
Q. Okay. And they haven't updated their web site to change the recommendations, have they?
A. No, they have not.
Q. We talked about that.
The American College of Radiology, what is the American College of Radiology, Doctor?
A. That's the professional association of radiologists in the United States.
Q. Those are the people that would be reading the results of spiral CT scans, aren't they, sir?

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A. They are certainly one principal group who would, yes.
Q. Now, the American College of Radiology does not recommend that asymptomatic smokers be screened for lung cancer with spiral CTs, does it?
A. They do not.
Q. In fact, what they are recommending, just like the NCI, is that a randomized controlled trial be conducted to see whether that type of screening decreases the likelihood of dying from lung cancer; right?
A. That's correct.
Q. The West Virginia Bureau of Public Health, do you recall discussing that with me in your depositions, sir?
A. That's correct.
Q. The West Virginia Bureau of Public Health is the lead state agency in West Virginia responsible for formulating healthcare policy in this state; correct?
A. I would believe that that's correct.
Q. Okay. And do you recall that you and I looked at something called "Healthy People 2000" during your deposition?

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A. Yes.
Q. That was a report issued by the West Virginia Bureau of Public Health; right?
A. That's correct.
Q. And that report identified priorities for improving health for West Virginians; correct?
A. It did.
Q. Those recommendations by the West Virginia Bureau for Public Health included recommending mammograms to screen for breast cancer; correct?
A. Certainly.
Q. Pap smears to screen for cervical cancer; correct?
A. That's correct.
Q. But they contained no recommendation that smokers be screened for lung cancer, did it?
A. That's correct.
Q. Instead, it recommended that the smoking rates be decreased, i.e., people quit; right?
A. That's correct.
Q. Now, are you aware that the West Virginia bureau for public health has issued a subsequent report called "Healthy People 2010"?
A. I am not aware of that, but I would not be

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surprised if they did.
Q. If you haven't reviewed it, I'm not going to bog us down asking you to read it before asking questions about it. But you just have not seen it; right?
A. I have not seen it.
Q. By the way, when -- well, let me move on.
Let me try to summarize this chart and sort of the state of the art today doctor a little bit. Isn't it true that no federal public health agency recommends that smokers be screened for lung cancer with spiral CTs?
A. That's correct.
Q. And that's not just true in this country; right?
A. There are many countries in which that is true, that's correct.
Q. There are no international public health agencies recommending that smokers be screened for lung cancer with spiral CTs, are there?
A. Not to my knowledge. Well, the only group that I am aware of that takes that recommendation is the international group for early detection of lung cancer. But that's not an agency, technically.

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Q. That's not a public health agency, is it?
A. It's a group. It's not a public health agency in the sense of being part of a governmental or World Health Organization structure.
Q. That's the group that holds those meetings that you go to; right?
A. That's correct.
Q. And that group includes participants such as participants from the GE Corporation that makes spiral CTs; right?
A. That's correct.
Q. And from the Kodak Corporation that makes the film that you use in spiral CTs; right?
A. I believe they sponsored it. I don't know if they participated, but certainly they were there.
Q. They sponsor those meetings?
A. They help sponsor them.
Q. Okay.
Sir am I correct that no authoritative group of physicians in this country, such as the American College of Radiology, currently recommends that asymptomatic smokers be screened with spiral CTs?
A. Other than the group that we just discussed, that's correct.

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Q. Okay. All right, sir. Let me try to completely sum this up. Other than the group that we just discussed, am I correct that no federal public health agency, no state public health agency, no national public health organization, no international public health organization, and no authoritative group of physicians in this country or elsewhere has so far recommended that asymptomatic smokers receive the type of monitoring that you are recommending in this case?

A. That's correct.

Q. Okay. We have been talking about lung cancer for the most part, Doctor. So I want to talk to you about monitoring for COPD; okay?

A. Okay.

Q. Because that's the other disease state that you made recommendations with respect to monitoring for; right?

A. That's correct.

Q. Now, am I correct that, if a smoker develops COPD, the principal medical intervention is to counsel that smoker to quit?

A. That's correct.

Q. Now, if an asymptomatic smoker comes to

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your office and is screened with spirometry and the spirometry is abnormal, shows some decreased lung function, the principal medical intervention is to counsel that smoker to quit; correct?

A. That is correct.

Q. All right. Now, if an asymptomatic smoker comes to your office and is screened with spirometry and their lung function is found to be normal, no change, the principal medical intervention is to counsel that smoker to quit; right?

A. That's correct.

Q. All right. In fact, sir, I'm going to use your words. You told a colleague of mine with respect to COPD, it doesn't matter if a patient is symptomatic or if they are asymptomatic, if they have normal lung function, if they have abnormal lung function, if they are left-handed, if they are right-handed, what you would do is tell them to stop smoking; correct?

A. Absolutely.

Q. Okay. Now, to be clear, you don't need pulmonary function testing or spirometry to tell a smoker to stop smoking, do you, sir?

A. I think that's absolutely clear.

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Q. I want to take another look at your recommendations in this case, sir you have recommended that the class members receive an initial spirometry test at the age of 40; right?
A. That's correct.
Q. And a second one would come at the age of 45. And then would be repeated every two years; correct?
A. That's also correct.
Q. Now, your recommendations are open ended in the sense that this continues for the life of the class member; right?
A. Those recommendations are open ended. The decision on when it would terminate was not part of the recommendation.
Q. Okay. I'm really asking you only about your recommendation, sir.
A. The recommendation --
Q. Your recommendation doesn't include an end date, does it?
A. It does not include an end date, that's correct.
Q. Also, if we have a smoker that quits, your recommendations for COPD testing do not include an

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end date in the sense that the testing stops a certain number of years after quitting; correct?
A. That's correct. The recommendations are based on age.
Q. Okay. We talked a bit yesterday about people with five pack years of smoking. I just want to make sure we understand how your recommendations play out for someone with five pack years of smoking who quits at age 25. Do you understand, sir?
A. Yes.
Q. That's the individual I want to talk to you about?
A. That individual, yes.
Q. That person would not receive COPD monitoring at the age of 25, would they?
A. No, they would not.
Q. In fact, they would not receive it until the first test would be at age 40; right?
A. That's correct.
Q. Fifteen years later. Right?
A. That's correct.
Q. And then even if that test were normal, showed no abnormal pulmonary function, they would get it again at age 45; right?

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A. That's correct. The criteria are is based on age.
Q. At age 45. And that would be twenty years after quitting; is that correct, sir?
A. That's correct.
Q. And even if that test were normal, these companies would be forced to continue paying for them to be tested with spirometry every two years for the rest of their lives; right?
A. Yes, that's correct.
Q. That's your recommendation?
A. That's the recommendations that have been made, that's correct.
Q. Am I correct, sir, that, if your recommendations were to be accepted and implemented, and the testing that you have recommended conducted, that these companies would be forced to pay for spirometry tests for individuals in the class that are no longer at any substantive risk for developing COPD and who would not benefit from the screening program?
A. The answer to the first part of your question is yes. The answer to the second part of your question depends on whether they were diagnosed

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with disease.
Q. Okay. For someone not diagnosed with disease?
A. No one benefits from the screening program unless they are diagnosed with a disease.
MR. FURR: Alecia, can I have the Blankenship deposition of 11-10? I think this one has been handed out already, Your Honor.
Would you pull it up, Jason, beginning at Line 23. Do not pull up Line 22.
MR. SEGAL: What page?
MR. FURR: Page 125.
THE WITNESS: Can you orient me with what.
MR. FURR: It's the Blankenship deposition taken on November 10th, year 2000, Page 125.
THE WITNESS: You said November 10th, 2000?
MR. FURR: Yes, sir.
THE WITNESS: Here we go, yes, sir.
MR. FURR: That's when I came to California to take your deposition; do you remember that?
THE WITNESS: I remember it. I don't remember the date specifically.
MR. FURR: Okay.
THE WITNESS: Could you again give me the page,

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I'm sorry.
MR. FURR: Of course, Page 125, Line 23.
Please do not read the information on line 22.
BY MR. FURR:
Q. Isn't it correct that the implementation of the program that you have recommended would result in tobacco companies paying for spirometry tests for individuals that are no longer at any substantive risk of developing COPD from their smoking?
That was the question, right, sir?
A. That's correct.
Q. And your answer was -- give me the whole answer, please:
I think as I've just answered your question, we don't have the ability to precisely define a small group of individuals with five pack years early in life, for that group the magnitude of the excess risk.
There may indeed be individuals for whom the damage done early in life is insignificant. Those individuals might then not benefit from the screening program because they won't develop the chronic obstructive lung

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disease.

However, we don't have a good way of separating those individuals from individuals who might have accumulated risk. And therefore, the best way to do that is to look. Was that your answer, sir?

A. Yeah.

Q. Okay. Thank you.

All right, sir. I now want to ask you some similar questions about how your recommendations for lung cancer screening, as opposed to COPD screening, would play out for a five pack year smoker who quits early in life. Do you understand?

A. Yes, I do.

MR. FURR: Jason, could I have Burns Demonstrative 18 that Mr. Segal put up yesterday?

BY MR. FURR:

Q. Do you recall this chart, Doctor?

A. Yes, I do.

Q. Yesterday, we talked about the fact that this is the dot -- or the box, I should say -- that represents the relative risk of lung cancer for someone with five pack years of smoking. Is that correct?

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A. That's correct.
Q. And I believe, yestereday, you told me that's not much of a risk, is it?
A. It's not much of a risk, that's correct.
Q. Now, yesterday you also told me that, when someone quits, in 15 to 20 years, 90 percent of their increased lung cancer risk from smoking declines. Do you recall that, sir?
A. 90 percent of the excess risk, that's correct.
Q. If you take a risk that's not much of a risk to begin with, and you decrease it by 90 percent, what kind of risk do you have?
A. You have a risk that is -- well, I can't answer the question the way you phrased it because the risk has to include age in the calculation. As I pointed out on the graph that I drew, the risk, absolute risk, for the individual actually increases slightly over that period of time.
The relative risk and the proportion of the excess risk that would have existed had they continued to smoke declines substantially.
Q. Let me try to say it in a nontechnical fashion. You have got really a small risk, don't

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you, from smoking?
A. Your risk on an absolute level is actually higher than when you stop smoking because the risk continues to rise with age.
Q. I said from smoking, sir. Not from aging.
A. The excess risk from smoking would be smaller, that's correct.
Q. Really small; right?
A. Yes.
Q. I mean, you had not much of one, and you reduced it by 90 percent; right?
A. That's correct.
Q. We are talking about really small risk; right?
A. That's correct.
Q. We are talking about a risk that you cannot distinguish epidemiologically from the risk of someone who has never smoked; right?
A. That's correct.
Q. Okay.
A. For that subgroup.
Q. For that group. And that would include some of the people in the class as we have discussed; right?

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A. That's correct.
MR. FURR: I'm running out of boards.
BY MR. FURR:
Q. All right. We will take our five pack year quitter. Really small risk twenty years later; right?
A. That's correct.
Q. All right. But let's say they quit at the age of 25. Twenty years later, they are 45; right?
A. That's correct.
Q. You are still not old enough to be eligible for your screening recommendations, are they?
A. That's correct.
Q. They doesn't start until they are 50?
A. That's correct.
Q. So we have got to add another five years of time before they even get to the first screening; right?
A. That's correct.
Q. I mean, this 25 year old who quits at five pack years, under your recommendations, they don't start getting lung cancer screening at 25, right?
A. That's correct.
Q. Or 30?

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A. Or 30.
Q. Or 35?
A. They get screening at 50.
Q. Or 40?
A. Or 40.
Q. Or 45?
A. Or 45.
Q. 25 years later?
A. That's right.
Q. A 25 year old quits five pack years in the year 2000, okay?
A. That's correct.
Q. That screening begins in the year 2025; right?
A. That's correct.
Q. And obviously, if they had a really small risk that could not be distinguished epidemiologically from a never-smoker fifteen to twenty years after quitting, twenty-five years after quitting, if anything, it's gotten smaller, hasn't it?
A. I think you are confusing the risks, and that's not a correct statement the way you phrased it. I'm sorry.

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Q. Sir, I'm not talking about the risk that every single one of us gets from aging. I'm talking about any excess risk they have from smoking. This is a case about monitoring for smoking, not aging. Do you understand that?

A. I don't believe that's correct. Issue, as I understand it, is monitoring for disease. And therefore it's the rate of disease that is relevant.

Q. You are not telling me that you think these companies should be forced to pay for monitoring for disease risk that's attributable to people age, are you?

A. No.

Q. We are talking about risk from smoking; right?

A. I am saying that the monitoring program is intended to detect disease that occurs in the population.

Q. Okay.

A. And therefore, it's the rate of disease that's important.

Q. Okay. It starts in the year 2025. Our five pack year smoker that hasn't smoked for 25 years gets a negative CT scan?

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A. That's correct.
Q. Under your recommendations, they keep coming back to get another one every year, wouldn't they?
A. That's correct.
Q. If they live to the age of 80, they come to the year 2055; right?
A. That's correct.
Q. Under your recommendations, five pack year smoker who quits in the year 2000 would still be getting spiral CT scans in the year 2055, if they live to be 80, that these companies would have to pay for; right?
A. That's correct.
Q. Okay. Thank you.
One more topic, Dr. Burns?
A. That would be wonderful.
Q. Yesterday you and Mr. Segal put up a board, and you testified that the tobacco companies had denied that smoking causes disease at various points in time. Do you recall that, sir?
A. No, I believe it was just by 1997.
Q. That's right. That's a point in time, isn't it?

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A. You implied it was multiple points in time.
Q. Actually you said up to 1997. So we are talking about 1997 and all the points of time up until then?
A. That's right.
Q. Now, sir, let me ask you, I'm going to put something up on the board and ask you if you agree with it.
MR. FURR: Jason, could you pull up Burns Demonstrative No. 5?
BY MR. FURR:
Q. It isn't that smokers don't know the risks. In fact, 95 percent of them are thoroughly aware of the health dangers, and 90 percent realize that their health could be affected.
You would agree with that statement, wouldn't you, sir?
A. Yes, I would.
Q. In fact, that's a statement that you made twenty years ago; correct?
A. That's correct. It a little bit overstates the actual data, but I did make it twenty years ago and it's generally true today.

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Q. Your words twenty years ago?
A. My words twenty years ago. Actually maybe more than twenty years ago now. Probably twenty-five.
Q. It was a statement you made in an interview in 1981. If my math serves me, it was twenty years ago.
A. I'm not as old as I thought.
Q. You make an interesting point, though, saying that that statement couldn't be as old as twenty-five. I take it that you believe that would have been a true statement twenty-five years ago?
A. The general theme is true. The actual numbers are a little higher than surveys demonstrate. But the actual -- the theme is generally true that's correct.
Q. Now, and, when you say that 90 percent realize that their health could be affected, you are talking about smokers having internalized or personalized their general awareness of the health risks of smoking to understand that this could be affecting my health; right?
A. That's correct.
Q. Sir, are you aware that there is no claim

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in this case that any class member was misled with respect to the health risk of smoking by anything that the tobacco companies said or didn't say or did or didn't do?

A. I'm not aware of the claims in the case. I just don't know.

MR. FURR: Thank you, Dr. Burns. That's all the questions I have now.

THE COURT: All right. Redirect examination?

MR. SEGAL: Good morning.

-- -- --

REDIRECT EXAMINATION

BY MR. SEGAL:

Q. Dr. Burns, it might be easiest to go backwards, so that's the way I'm going to go. The first thing I want to talk to you about --

MR. SEGAL: May I please have my board with my six recommendations?

BY MR. SEGAL:

Q. Epidemiological data. Do you recall that Mr. Furr's questions about smoking and your proposed plan, he kept saying "the epidemiological data"?

A. That's correct.

Q. Okay. Is there any study which collects

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epidemiological data on only people who smoked five pack years and then quit?

A. No. There is no such data that I'm aware of.

Q. Is the data which you relied upon, I take it, from the Surgeon Generals' reports and the scientific literature data about all kinds of smokers?

A. That's correct.

Q. And that's how you computed when the risk begins to go up; correct?

A. That's absolutely correct.

Q. Now, what you drew on that little board for the jury the other day, whether it's someone who quit or someone who continued to smoke, the epidemiological data shows that the incidence of disease begins to occur at age 50; right?

A. That's right.

Q. And Mr. Furr kept saying "force the companies to pay." Are you here to force anyone to do anything?

A. I am not.

Q. All right. Now, if you had recommended, for the five-year smoker, they get screened at 30 or

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40 or 35 or whatever those years he said, you don't have any epidemiological data to support that there is an incidence of disease whether they have stopped or haven't stopped, do you?

A. There is epidemiologic data that suggests that, at age 30, there isn't sufficient incidence of disease, that's correct.

Q. So what you did is suggest a plan that begins the screenings when you are going to start to see disease in the population, whether they quit or whether they have continued; correct?

A. That's correct. It's based on the age-related increase in risk of lung cancer in the population.

Q. And in fact, in the United States of America today, isn't it true that about half of the people who are getting diagnosed with lung cancer are people who have already quit?

A. That's correct.

Q. Now, the next series of questions I want to ask you has to do with monitoring procedures exist that make the early detection of disease possible.

A. Yes.

Q. And you were asked about diagnoses.

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A. Yes.
Q. Mammograms, they early detect a possible breast tumor; correct?
A. That's correct.
Q. You must have follow-up procedures after a mammogram to determine whether or not indeed what showed up on the mammogram is or is not a cancerous lesion; correct?
A. Absolutely, sure.
Q. Okay. And you have to do that with a needle biopsy or an open biopsy or a procedure that goes in and takes a piece of the tumor out?
A. That's correct.
Q. All right. And sometimes mammograms show fibrocystic lesions and benign lesions that aren't cancerous; correct?
A. Sure.
Q. Okay. PSA for men's prostate cancer, it can early detect; right?
A. That's correct.
Q. It can early defect, but then you have to have a follow-up procedure before a diagnosis can be made; correct?
A. Sure. It's not a diagnostic test. It's a

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screening test.
Q. And indeed, sometimes, when they go in to make the diagnosis, although the PSA early detected some things wrong, it turns out to be a benign condition in the prostate, not a cancer; right?
A. That's correct.
Q. Now, with regards to that early detection, Mr. Furr went through that chart of organizations. Do you recall that?
A. I do.
Q. And he said these people don't now recommend the screening program that you have suggested here. Do you recall those questions?
A. I do.
Q. Well, first of all, Henschke's study came out in '99, was the first one?
A. I believe so.
Q. Okay. And it's 2001. Is it surprising to you as a member of the public health community that no major organization has yet to adopt Henschke or anybody else's screening procedure and follow-up procedures?
A. No. It's not surprising at all.
Q. All right.

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A. Sometimes their decision-making process moves very slowly.

Q. And you were also asked about whether or not the Surgeon General reports, the 18 you were involved in, you were asking whether or not that makes -- the Surgeon Generals' reports don't even address that issue, do they?

A. No. It's not at all an issue in any of the reports.

Q. All right. So it's not that that don't recommend the screening; they don't even talk about that issue, do they?

A. That's correct.

Q. All right. Now, you went through that chart and says nobody recommends this or that. Now, the fact of the matter is, though, all of the organizations who have spoken on the point do agree that the test can early detect the presence of lung cancer; right?

A. Absolutely. There is no question on that point.

Q. And based on all the epidemiological data and the books he said I piled up, you understand about and have studied staging of cancer?

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A. Yes, I have.
Q. Doctor, isn't it absolutely 100 percent scientifically true that early detection of lung cancer has been demonstrated to increase or decrease mortality and increase the ability to treat the disease?
A. That early stage lung cancer has a much better survival than late stage lung cancer, it has been unequivocally demonstrated.
Q. No doubt bought it?
A. No doubt about it.
MR. FURR: Objection, move to strike as nonresponsive.
THE COURT: Objection overruled.
BY MR. SEGAL:
Q. And just so it's clear, that issue is scientifically proven, and everybody agrees the CT can -- everyone who has spoken on the subject agrees that CT can detect lesions when they are at a smaller stage?
A. That's correct.
Q. Then why do we need a gold standard mortality study to prove what's already known?
A. Many of us feel that we don't need it

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before we put in place an advance that can have such a tremendous impact on people's lives. There are individuals and there are organizations who believe that you need to be very conservative in making these recommendations; and that we need to demonstrate, as time goes on, that there is less deaths produced in the group that's screened.

So there is a difference of opinion in the public health community as to whether we have enough evidence based on incredible rates of early detection that are occurring with CT to move forward, or whether we should wait the extended period of time that it will take to collect data on whether or not people die more or less frequently with screening procedures.

Q. And that's the very opinion that you have given this jury here in this courtroom; correct?

A. Absolutely.

Q. Mr. Furr asked you about other opinions. The fact of the matter is, when you go to those international conferences, when you go to public health conferences, when you meet with your colleagues, that's been your opinion with regards to the new data on the spiral CT scan since it became

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available?
A. That's correct.
Q. By the way, on that point, as far as new data, do you remember you were asked about the standard of care? Do you recall that?
A. I do.
Q. In West Virginia. And that you have changed your opinion over time in this case?
A. That's correct.
Q. The reason you have changed your opinion is because the data on spiral CT scans is all new data; right?
A. That's correct.
Q. So what you told the jury is, if I get new data and I believe the data is good, validate datea, I'm going to change my opinion based on it; correct?
A. That's correct. That's how science works.
Q. I want you to hear something that was testified to before the jury under oath that Mr. Furr referred to. I want to read to you another part of Dr. Gupta's testimony that day to the jury. He was asked a question, okay, about the 2000 odd lung cancer patients. They have an early detection program at WVU. His answer was:

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The things that really change over the years, like I said, for the past four or five years and, especially in last couple of years, the standard of care has really not been -- has really been not to rush for surgery as you have an abnormal CT scan. In other words, if a CT scan is positive, you don't take the patient directly to surgery. It's a standard of care in our institution -- this is West Virginia University Medical center -- to do a PET scanning first. It's a noninvasive test which provides you 95 percent accuracy whether this is going to be cancer or not.
95 percent accuracy.
And that really minimizes unnecessary biopsies and procedures in patients which actually don't have lung cancer.
Assume that, that they did hear that testimony. Let me ask you this: If Dr. Gupta and his buddies up at -- his doctor friends up at the WVU Medical Center published a peer-reviewed study that has data that you can analyze that demonstrates that, you would change your opinion again and say, wow, that really makes it even better, doesn't it?

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A. It certainly would make a dramatic improvement in your ability to make diagnosis, that's correct.

Q. And as to early detection and what people have said about it, okay, not reducing mortality, early detection, all right, because that's what I want to --

A. Absolutely.

Q. I want to look at what those organizations have said very briefly.

MR. SEGAL: Ms. Gina, may I have my pointer?

Would you put up the first document, please?

May I approach, Your Honor?

THE COURT: Yes.

THE WITNESS: Thank you.

BY MR. SEGAL:

Q. Dr. Burns, the first article I want to refer to is the American Cancer Society Guidelines for the Early Detection of Cancer. The American Cancer Society is one of the organizations that Mr. Furr referred to; correct?

A. That's correct.

Q. All right. Let's see what they in their guidelines for the early detection of cancer say

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about whether or not it can early detect with spiral CT scan.

Here it is. Low-dose computed tomography. That's a low-dose CT scan; right?

A. That's right.

Q. They found that:

> Newer technology appears to be more promising than conventional chest x-rays for the early detection of lung cancer.

Early detection?

A. That's correct.

Q. It's better at it, that's what they are saying?

A. It's better at it.

MR. SEGAL: Next article, please?

May I approach, Your Honor?

THE COURT: Yes.

BY MR. SEGAL:

Q. Could you tell the ladies and gentlemen of the jury, Dr. Burns, who this article is by?

A. This article is by the American Cancer Society. It updates their positions on early detection guidelines for prostate, colorectal cancer and endometrial cancers and also reviews the data on

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early detection of lung cancer.
Q. And this is a 2001 publication, this year; correct?
A. That's correct.
Q. Could you go to the part -- here we go:
Low-dose CT is more sensitive than chest x-ray in the detection of small pulmonary nodules which pose challenges to establishment of protocols for triaging cases with clear malignant potential.
First question, does that mean that low-dose CT scanning works better than chest x-rays?
A. It certainly does.
Q. And does all the evidence that you reviewed indicate within reasonable medical certainty that it is certainly more sensitive than chest x-rays?
A. Absolutely. I don't believe there is any doubt on that issue.
Q. Is that the basis why, Dr. Burns, you had to change your recommendation, because you have got to recommend what's the most likely thing to diagnose early, detect early -- I said diagnose, strike that.
You have to recommend the thing which will

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detect the disease earliest to try and reduce the mortality; correct?

A. That's correct.

Q. Was there one more on this article, or was that it?

In the past few years -- this is 2001 -- in the past few years, however, results from screening studies using spiral CT have been regarded as sufficiently encouraging to lead a growing number of institutions and facilities to promote CT screening to asymptomatic individuals at risk for lung cancer, with such promotion likely to increase.

Dr. Burns, is that a recognition by this group that, in 2001, although they don't recommend it, institutions are indeed in growing numbers providing CT screening to asymptomatic people who are at risk for lung cancer?

A. Yes. That's exactly what it says.

MR. SEGAL: May I approach, Your Honor?

THE COURT: Yes.

BY MR. SEGAL:

Q. Doctor, tell the jury which group authored this publication.

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A. This is a press release from the National Cancer Institute.
Q. And that's a group that you do work for; correct?
A. Certainly is.
Q. And it's a group that Mr. Furr asked you some questions about that they don't recommend that you do this screening?
A. It is a group that does not recommend the screening, that's correct.
Q. With regards to whether or not they think it works, though, let's look at what they say. April 11th, 2000.

Promising evidence from several studies shows that the scans can detect small lung cancers.

Small lung cancers, the scans can detect them. They are talking about low-dose spiral CT scans; correct?
A. That's correct.
Q. That's the studies they are referring to; correct?
A. That's correct.
MR. SEGAL: Next article, please?

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BY MR. SEGAL:

Q. Let's look at the consensus statement of the Society of Thoracic Radiology. Screening for lung cancer with helical computed tomography.

Let's see what they say. Now, this is the consensus statement. That means that the doctors who wrote this got together and talked about it and came to what's called the consensus.

In other words, it may not be all of their 100 percent views, but it's what they all would at least agree was their view together; correct?

A. It's usually the view that they can all agree on, that's correct.

Q. And Dr. Henschke is one of the people who actually was on this panel; is that correct?

A. Yes, she is.

Q. All right. And look:

> Improvements in CT technology make lung screening feasible. Early prevalence data indicate that about two-thirds of lung cancers that are detected by CT screening are at an early stage. Other data support the postulate that patients with lung cancers detected at this early stage have better rates of survival.

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That means it works at detecting; right?
A. Yes.
Q. And that, if you look at other studies, it means that you are likely to be able to begin to reduce mortality; correct?
A. That's correct.
Q. So you have to take two studies to come up with the conclusion that they reached? You can't just look at one; correct?
A. That's correct.
Q. All right. Let me cut this short. Doctor, is there any group which has -- or person, Doctor, which has reviewed whether or not the low-dose spiral CT scan can early detect lesions, okay, that has said it's not better at doing that than other technology?
A. There is no knowledgeable group that I'm aware of that has done that.
Q. Is there any knowledgeable group that you are aware of that has said that detecting lung cancers at Stage 1 does not increase the ability to treat that cancer?
A. No. That would be completely contrary to existing data.

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Q. The gold standard you were asked about, the mortality studies. All I want these folks to understand about that in public health. It's nice to get to the gold standard; correct?
A. That's correct.
Q. And screening tests, when they do the follow-ups, that's a what they are looking for is have we met the gold standard, is it reducing mortality; correct?
A. That's correct.
Q. But they don't always wait for studies that do that before they recommend screening, do they?
A. No, they don't, because there is a substantial cost to waiting.
Q. Yeah, and that substantial cost, I wanted to talk to you about that for a minute. There was some math Mr. Furr did about 261,000 class members. Do you recall that?
A. I do.
Q. All right. Now, first thing I want to make sure everybody understands, everybody in that group is not 50 years old; right?
A. That's correct.
Q. So Dr. Gupta and his colleagues don't need

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to be concerned that 261,000 people are going to show up for a CT scan; is that correct?
A. That's absolutely correct.
Q. But using Dr. Henschke's data, right --
A. Yes.
Q. -- he said that -- what was it about -- how many 54,000 people?
A. 60,000 would require a follow-up.
Q. Okay.
A. And 54,000 of those would be follow-ups that were negative for cancer.
Q. All right. But the ones that weren't, there would be about six to seven thousand people, based on Henschke's data, who would get early detected for lung cancer, wouldn't they?
A. That's correct. Based on those -- if you use those numbers, that's the way the math works out. It would be six thousand.
Q. Six thousand?
A. Six thousand people who would have their lung cancer detected, that's correct.
Q. And if Dr. Gupta is right, using his standard of care with the PET scanning, 95 percent of those people wouldn't even have to have an

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invasive procedure to get to the point that they knew they needed to have the cancer resected?

A. Well, that's correct, certainly.

Q. Oh, remember the questions about statistical significance when he was asking you about the line you drew when you told the jury, at five years, this is when the risk begins?

A. Yes.

Q. Okay. We don't have data on people who smoke for five years and quit; right? We don't have enough of those people in any database that you are aware of to make a statistically significant statement; correct?

A. That's correct.

Q. So you have to look at the whole population of smokers upon which data is available to testify within reasonable certainty as to when the risk increases?

A. That's correct.

Q. All right. And just so everybody understands, the data that you looked at, is that called mortality data?

A. Yes.

Q. Okay. That means people are dying of

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disease; is that correct?
A. That's correct. It measures the point at which they have already died of their lung cancer.
Q. Well, what good is it to start a screening procedure to early detect disease if you start it at the point that people are already dying of the disease?
A. Well, there is certainly no point for screening someone who is already dead. But what you are doing is using the mortality data to define the point at which the risk begins to rise, and you screen people from that point onward.
Q. All right. And so, if you wait until there is statistically significant -- I will get that word right -- statistically significant mortality, and that's where you start doing your studies, people are already going to be dying of the disease as opposed to early detecting the disease that's killing them; correct?
A. That's correct. The people would -- you would exclude a lot of people who are at increased risk and will die of lung cancer from your screening if do you that.
Q. On the book that they keep showing you and

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the web site that they had you go look at last night; okay?
A. Yes.
Q. All right. They have not, since 1996, okay, which is before Henschke, they have not updated their recommendation; correct?
A. That's correct.
Q. And from reading how they are doing it, okay, it's not just that they -- it's just that they haven't done it. There has been no decision not to do it. They just haven't done it?
MR. FURR: Calls for speculation, objection. He testified he doesn't know.
THE COURT: The objection will be sustained. I think you can reframe the question.
MR. SEGAL: I will, Your Honor.
BY MR. SEGAL:
Q. Doctor, when you looked at the web page, okay -- first of all, you are aware of the ongoing conferences to revamp the book; right?
A. Certainly. I'm aware that they are ongoing, yes.
Q. All right. And it says, If we reach a decision, we are going to put it on the web page;

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correct?
A. Technically it says, When we reach the decision, when we have formatted the new format for the 2002 version, we will put it on the web site, web page.
Q. Have they reached a decision that they will not update their recommendation on screening for people who smoke cigarettes?
MR. FURR: Objection, Your Honor. It's the same question. He already testified he doesn't know.
THE COURT: Objection will be overruled.
A. No, they haven't posted it on the web site. They have not reached a decision.
THE COURT: How much more do you have Mr. Segal. I would like to --
MR. SEGAL: If we took our break, I think I would be done you in about five or ten minutes, if that.
THE COURT: You want to take a break and then come back?
MR. SEGAL: If that's all right.
THE COURT: Let's go ahead and take the morning break now.

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(A recess is taken.)
(In open court with a jury present.)
THE COURT: All right, be seated, please.
Mr. Segal.
MR. SEGAL: May it please the Court.
BY MR. SEGAL:
Q. Dr. Burns, a couple more areas, and then I will sit down. The first area I want to cover with you, though, deals with the questions you were asked about a Scott case and a mock trial or a mock something. Here is what I want to know.
The first thing is, the Scott case doesn't have anything to do with Scott Segal; that happens to be the name of the case somewhere else; is that correct?
A. I think that's true.
Q. The second point is, whatever you did with those lawyers, all right, you and I have only known each other since this case; correct?
A. That's correct.
Q. Never met each other before in our lives before we got involved in this case?
A. That's right.
Q. And I have seen you at your deposition.

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And then you came here to testify; right?
A. That's correct.
Q. All right. We haven't done any little mock trials and got some jurors and practiced questions and answers and stuff like that, have we?
A. No.
Q. In fact, the truth is, Dr. Burns, although it may be different in terms of my style, you and I have never, ever, ever rehearsed the questions which I was going to ask you and the answers which you were going to give?
A. No. I take them as they came.
Q. And indeed, a lot of them, you had no idea I was going to ask you; isn't that true?
A. There were a couple, even after you asked them, I had no idea.
Q. The other thing in terms of -- you were asked some questions about the five-year people, the five-year people, all right, talking about how much you have testified and relating that to that.
First of all, I am correct that there is nobody alive today who has as much integral knowledge and has worked on as many Surgeon General reports and the data included in them as you; is that correct?

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A. I believe that's correct, yes, sir.
Q. And in terms of the data that you use in your work in public health, both the Surgeon General's and the other data, that data is based on populations; right?
A. Absolutely.
Q. Okay. And in populations, there are people, when you look at risk, at both ends of the spectrum; right?
A. Certainly.
Q. Okay. And what you did in this case was to say here is where the risk begins and here is what you need to do about that risk; correct?
A. That's correct.
Q. So we could spend a long time now, okay, talking about people with 30 pack year histories who have quit, people with 50 pack year history who have witness, people with 80 pack year histories who have quit and people with all those histories who continue to smoke; right?
A. Certainly.
Q. And you could talk all about risk and how much more it goes up with time, but the point is: The whole population is at risk; right?

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A. That's correct.
Q. Okay. And in epidemiology and public health and stuff, you don't look at populations and say, well, we will lop off the bottom 1 percent or 2 percent even though they are at risk, and we will just forgot about them; you don't do that, do you?
A. No, not about risk.
Q. It would be unacceptable and inconsistent with good public health policy, wouldn't it, Doctor?
A. That's correct.
Q. The long time studies that they are talking about doing, you told the jury a little bit about it. Mr. Furr asked you a little bit about it?
A. Yes.
Q. And you testified yesterday about how many people die of lung cancer every year as a result of smoking cigarettes?
A. Yes.
Q. Am I correct that, during the course of those studies, over a million people will die in this country who have smoked cigarettes while those studies are going on?
A. Actually it's closer to two million. It's a little more than two million.

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Q. Doctor, I believe you said earlier -- we may not have written it down exactly right -- but as far as this new technology and lung cancer, that this is the most exciting development in your entire professional career; is that correct?

A. That's correct. This is the most exciting technologic advance in lung cancer and the ability to do something about lung cancer since I've been practicing medicine.

Q. And why is that? Would you explain that to these folks.

A. Because, most of the time when you deal with lung cancer, there isn't anything you can do. You make a diagnosis, and the person is going to die of it.

And it's tough as a physician watching those people die, and it's tough not being able to do anything for them. And all of the sudden, we can now take the most common cause of death in both men and women and do something about it. I mean, that's what I went into medicine to do was to make a difference, and now we can.

MR. SEGAL: Thank you Dr. Burns for being here. That's all I have.

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THE COURT: Recross-examination.
MR. FURR: Yes, sir.
-- -- --
RECROSS EXAMINATION
BY MR. FURR:
Q. Dr. Burns, I will be brief. I want to see if we can put in context a little bit some of these statements Mr. Segal had you read from articles.
A. Certainly.
MR. FURR: Could I have BW 23542 please, if I could have the first page?
BY MR. FURR:
Q. American Cancer Society Guidelines for the Early Detection of Cancer. That's one of the articles Mr. Segal just looked at with you.
MR. FURR: Could you go, Jason, to the highlighted material.
BY MR. FURR:
Q. In the yellow, we see what Mr. Segal read to you; right?
A. That's correct.
Q. Let's look at what it says right above it in the green. Can you blow that up, Jason.
Lung cancer. At this time no

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organization recommends routine screening for lung cancer either among the general adult population or in individuals who are at higher risk due to tobacco or occupational exposures. Did I read that correctly, Doctor?

A. Yes, you did.

MR. FURR: Could I have BW 23803, please? Can you blow up the title?

BY MR. FURR:

Q. American Cancer Society Guidelines for the Early Detection of Cancer: Update of Early Detection Guidelines for Prostate, Colorectal and Endometrial Cancers and Update 2001: Testing for Early Lung Cancer Detection. That's one of the articles Mr. Segal just reviewed with you, isn't it?

A. Yes, it is.

Q. Can you go to the highlighted material, Jason. And that yellow is what Mr. Segal read you to. Let me ask you to blow up the scene green right above it, Jason:

The ACS does not recommend lung cancer screening for asymptomatic individuals at risk for lung cancer.

Did I read that correctly, sir?

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A. Yes, you did.
MR. FURR: Jason, could I have RJR 20986, please?
BY MR. FURR:
Q. This is a press release from the National Cancer Institute on spiral CT scans for lung cancer; correct?
A. That's correct.
Q. Mr. Segal read -- let's blow up the highlight, Jason.
Mr. Segal read to you the material highlighted in yellow. Let's see what would have been read if he had kept going.

> Promising evidence from several studies shows that the scans can detect small lung cancers. But detecting these early tumors has not been proven to reduce the likelihood of dying from lung cancer, the gold standard for any cancer screening test. The National Cancer Institute is designing a large study that should conclusively answer whether spiral CT does, in fact, reduce mortality.
>
> While spiral CT scans may eventually prove to be an effective lung cancer screening

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tool, they can trigger unnecessary invasive testing or even chest surgery. Scarring from smoking and other noncancerous changes in the lungs can mimic tumors on CT scans, challenging the radiologists who read them. Interpretations of the scans can vary, leading to confusion about recommendations for follow-up care.

Did I read that correctly, sir?

A. You did.

MR. FURR: Jason, could we have RJR 26434. This is a document entitled a "Consensus Statement of the Society for Thoracic Radiology, Screening for Lung Cancer with Helical Computed Tomography."

Jason, blow up the author.

The jury has seen this before, but just to be clear, Dr. Henschke, the investigator that we have talked about so much is one of the authors of this statement; correct?

A. That's correct.

Q. Could you show us the highlighted material, Jason?

Mr. Segal read to you that what was in the yellow. Let me see what he would have read had he

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kept going.

Improvements in CT technology make lung screening feasible. Early prevalence data indicate that about two-thirds of lung cancers that are detected by CT screening are at an early stage. Other data support the postulate that patients with lung cancer detected at this early stage have better rates of survival.

Whether this will translate into an improved disease specific mortality is yet to be demonstrated. The suggested technical protocols, selection criteria, and method of handling the numerous benign nodules that are detected are discussed. It is the consensus of this committee that mass screening for lung cancer with CT is not currently advocated. Did I read that correctly, sir?

A. Yes, you did.

MR. FURR: Leave that up, Jason.

BY MR. FURR:

Q. Let me just ask you something, Dr. Burns. If you give somebody a CT scan and you get a positive result, what you know is that you have a nodule; right?

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A. That's correct.
Q. You can't look at a CT scan with no other information and say to that patient, I have detected lung cancer in you, can you, sir?
A. With certain exceptions, which is very extensive late stage disease, no. It requires a biopsy to make the diagnosis.
Q. It requires the follow-up procedures that we have talked about, right, sir?
A. Before you make a diagnosis of cancer, you have a biopsy in general, that's correct.
Q. Before you can tell that patient that we have detected lung cancer in you, you have to do the follow-up diagnostic procedures; right?
A. That's correct.
Q. Okay. And there has been a lot of talk about how the public health community is slow in its deliberations and in the way it makes recommendations.
Sir, you are not telling this jury that the public health community withholds screening recommendations that it knows have been known to improve public health, are you?
A. The question has both a yes and a no. And

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I would be happy to explain that.
Q. Go ahead.
A. All right. It is true that the public health community attempts to do its very best job at making recommendations on these issues. The nature of that process, however, is that it is very late because it requires publication of data, it requires validation from other studies of that data, it requires completing all of the follow-up from these studies necessary to demonstrate mortality before the consensus of these large organizations is such that we can make a clear and unequivocal recommendation.
So, yes, the organizations come very late to the process, as has been true in mammography, Cancer Institute, as I believe is true in this instance. It will take a long time for those organizations to accumulate all the data necessary for them to make a definitive gold standard answer, and that indeed will produce a cost which is that all of the opportunity to make these diagnoses early in people who are currently developing lung cancer would have been lost.
Q. Okay. Are you finished, sir?

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A. Yes.
Q. Now, I find that interesting, because, just fifteen minutes ago, you told Mr. Segal that the public health community made recommendations about screening for breast cancer and prostate cancer, I think you said, before they had this gold standard data; right? Isn't that what you told him?
A. I don't believe I said quite that.
Q. But that's what happened, isn't it?
A. They made those recommendations. Some of them waited for mortality data. In the PSA, I don't believe there is mortality data.
Q. But they are making that recommendation now without that data, aren't they, sir?
A. For PSA, they are.
Q. But they are not doing the same thing for spiral CT for lung cancer, are they?
A. No.
MR. FURR: Thank you very much.
THE COURT: May this witness be excused not subject to recall?
MR. SEGAL: I would so request, Your Honor.
MR. FURR: Yes, sir.
THE COURT: Doctor, thank you very much.

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THE WITNESS: Thank you, Judge. It has been a privilege.

(The witness leaves the courtroom.)

THE COURT: Are you ready to do what you are going to do next?

MR. SEGAL: We are, Your Honor.

MR. SEGAL: I don't have to ask Mr. Evans to take the stand. It's a video, Your Honor.

THE COURT: All right. Are you all ready for it?

MR. SEGAL: Yes.

MR. FURR: Your Honor, would you like us to clean up any of this?

THE COURT: It's all right with me. Is it in the jury's way? Once the electric turn is out of the way. That's fine. You can get that at a later time. That's not in your way, is it?

MR. SEGAL: This is the prior testimony of Lawrence Meyer taken in the State of Washington versus the American Tobacco Company on September 10th, 1998.

Mr. Meyer was a former outside counsel to Liggett, and the plaintiffs designations are going to be presented by videotape.

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THE COURT: All right, fine. This one will take about an hour; right? Is that my understanding.

MR. BAKER: About an hour total, Your Honor. Our is by video, and theirs is by reading.

THE COURT: So.

MR. BAKER: Total is an hour.

THE COURT: We will finish this and then take the noon break?

MR. BAKER: That's correct.

THE COURT: Okay.

-- -- --

LAWRENCE G. MEYER

being first duly sworn in deposition, testifies and says as follows:

-- -- --

Q. Please state your name.

A. Lawrence G. Meyer.

Q. And your address?

A.

DELETED.

Q. How are you currently employed?

A. I'm with the firm of Gadsby & Hannah with offices principally in Boston and Washington. I joined that firm in May of 1985.

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Q. Where did you go to law school?
A. Michigan.
Q. What year did you graduate?
A. 1964.
Q. When did you begin your representation of Liggett in this case?
A. In about 19 -- I started in late '72, early.
Q. Was Liggett a previous client of Patton Boggs?
A. No.
Q. So the contact was with you, as opposed to the firm?
A. I mean, you are getting into the firm issues. Yes, Liggett was always my client at Patton Boggs until I left, and certainly I brought the client there, you know. In terms of the firm at that particular time in its history, attribution issue were always serious issues with my client.
Q. Mr. Meyer, what was the XA project?
(The video is interrupted.)
THE REPORTER: Your Honor, I couldn't hear clearly the last question.

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THE COURT: Nick, of course, is taking down -- trying to take down with absolute fidelity what is being said.

Now, is there another way of doing this so he can, sort of as a redundancy, because --

MR. BAKER: We can give him a copy of the transcript.

THE COURT: Is that all right with everybody else?

MR. FURR: No objection from us, Your Honor.

THE COURT: All right. And he can then refer to the transcript when his contemporaneous transcription is -- he doesn't understand it. Is that all right?

MR. FURR: Yes, sir.

MR. BAKER: In addition, we could put up the subtitles if that would help.

MR. FURR: No, sir.

THE COURT: We don't need to do that. As long as we have the redundancy and there is no objection, is that all right?

MR. BAKER: That's fine, Your Honor.

MR. FURR: Yes, sir.

THE COURT: All right. It's all right with

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everyone? Okay.

(The Video Continues)

A. The XA project was a project that originated before the period of time in which I started representing Liggett in which Liggett had decided that they would seek to replicate the underpinnings of the Surgeon General's report and create a tobacco that possibly had different biological activity than traditional tobacco.

The Surgeon General would base his report -- and I'm giving you my impression, you know, today -- on the results of mice painting experiments that were done by a guy named Wynder and others.

They had genetically raised mice, you know, prior to the 50s, I believe, that were very skin sensitive. And they would then take smoke condensate, or tar, and paint the residues of that tar on the skin of these mice. And in doing so, they create a number of tumors and a number of carcinogenistic tumors, or cancer tumors.

Liggett was trying through this project

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to really create altered tobacco that, when the tars of that tobacco or smloking condensate were painted on the same kind of mice, that they would reduce the biological activity or the formation of tumors or cancers.

The XA procedure, you know, proceeded over a number of years. You know, I learned about it, you know, after Joe Greer and I sort of started working together. And it was one which had resulted in this time frame of a focus or a mixing, if you will, of certain palladium and nitric salts.

And by treating tobacco with these certain palladium and nitric salts and then using the smoke condensate of that tobacco, they were able to reduce overall tumor growth by 88 percent and carcinogenitic tumors by 100 percent.

And they achieved certain patents as a result of that, and that was the project which, you know, was the XA project, you know, the scope of that project. Whether or not it had a different name before, let's say, the early to mid '70s, I can't say. But that's what I

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understand project XA was.

Q. This mouse skin painting which you have described, Liggett, I take it, or someone on Liggett's behalf had engaged in mouse skin painting?

A. Well, let me rephrase my answer. The Surgeon General based his Report on Smoking and Health on mice painting experiments. Liggett, you know, did some of these themselves in the early days, as I understand it, and also retained A. D. Little to work with them and do the biological testing of the compounds that they developed in their own laboratory.

And A. D. Little, which, you know, was a firm of some -- you know, of some prominence in Cambridge, was actively involved in the biological testing piece, initially at least. And then, you know, as it followed along they engaged others,

But they were actively involved in the actual biological testing of these tar condensates from these various compound-altered tobaccos. And the one that, you know, appeared to offer, you know, a lot of promise was this

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palladium and nitric salt combination.

Q. Did the XA project have names other than XA?

A. Well, I actually remember having in my office at Patton Boggs some packs of cigarettes that had the name Epic on it, and I remember talking about it as Epic, which was going to be the brand name of the cigarette at one point in time.

I have seen in my review of some of these documents that it was also called True, but, you know, I quite frankly only remember it as Epic, you know. And that's because I actually saw the packaged cigarettes that had been made pursuant to the patent with the Epic name or the coded name, which was for Epic, the white package cigarettes with, you know, coded numbers.

Q. Who were the individuals at Liggett who were involved in the development of the XA project?

A. Well, you know, what I could say, to the best of my recollection, the firm that I spent the most time talking to from a

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scientific standpoint was Jim Mold.
Mold had a group that he worked with. Bowen Ross was the patent lawyer based in New Jersey in those days, I think later in Durham, who really had sort of shepherded this project.
But, you know, the guys that I remember involved in XA were all the chief executives and all the principal executives of Liggett. Greer was actually involved, a fellow named K. V. Dey became involved. A fellow named Art Sloat, who I believe carried the title of President of the tobacco company, was involved; Ray Mulligan, the chief executive of Liggett Group was actively involved; James Scott Hill was actively involved, Bob Seidensticker was actively involved.
I mean, this was a project that everyone at the company thought was really very important and so, you know, it's hard for me to think of anyone who wasn't involved who I knew at Liggett. I mean, this was a very big project in these days at Liggett.
Q. How long, to the best of your

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recollection, was the XA project in development at Liggett?

A. I don't actually know the precise answer, but I think that Liggett took upon itself, you know, shortly after the Surgeon General's report to really start this project in earnest.

So, you know, I think it was ongoing for at least ten years before I arrived. The Surgeon General's report, the date of which escapes me, but we could date it from that point forward.

Q. Do you have an understanding of what the object or goal of the XA project was?

A. Well, the XA project, you know, the goal, as was explained to me, you know, repeatedly, then I got into a lot of discussions with Liggett about this, that the goal was to create, you know, a tobacco that minimized or eliminated the biological activity that caused these tumors, particularly the carcinogenitic tumors in the mice that were the experimental vehicle.

Q. Was it Liggett's goal to market such

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a product?
A. Well, it certainly was -- it certainly was Liggett's goal, you know, as this project went forward, to end up with a product that could be taken to the market. You know, they certainly had the objective to create a product that could be taken to market.
Q. What precisely was your role, Mr. Meyer, with regard to the XA project?
A. Well, I don't know that I had a precise role. My role certainly included, you know, first talking unofficially very generally with certain members and staff of the Federal Trade Commission and the FDA if appropriate and perhaps others, and then officially talking with them about, you know, what Liggett had to develop, what kind of patent had issued, and the dilemma that Liggett found itself in, you know, in terms of the regulatory issues associated with bringing this project to market.
Q. Did the Liggett people with whom you met concerning the XA believe that there was a consumer demand for such a product?

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A. I think they believed, you know, that -- I mean, let me put it this way. I never heard it discussed quite that way. What I did hear discussed is, you know, whether or not there was enough palladium in the world to be able to produce the number of cigarettes that they expected to sell.

Q. These are internal Liggett discussions?

A. Yes.

Q. Was it Liggett's discussion that the XA was less hazardous with regard to the potential of developing cancer from smoking?

A. I don't know that Liggett ever -- I don't know that Liggett ever came to that conclusion. Certainly we weren't -- you know, we weren't going to advertise or market it that way.

What we were going to advertise and market it as is, you know, an answer or a response to the concerns that led to the Surgeon General's report. Now, I guess the common sense reading of that would be implicit in that would be, if we neutralized or

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virtually neutralized what led to the Surgeon General's finding that smoking was dangerous, that certainly this was an answer to the Surgeon General's concern about smoking and health, or at least an answer to part of the Surgeon General's concerns, not all of them.

Q. Did every Liggett employee other than Mr. Dey report to you any statements by other members of the industry with regard to the XA project?

A. Oh, I mean, all the time.

Q. Did Mr. Greer make any such statement?

A. Sure. I mean, remember, you know, I mean.

Q. What is it; what did he say?

A. Mr. Greer would say -- Mr. Greer said on a number of occasions, you know, that he had been opportuned by various members of the committee of counsel and others.

You know, Joe was a figure in the industry. I mean, everybody knew Joe. Everybody thought Joe was sort of a dinosauric figure, but Joe was really liked by everybody.

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Maybe not everybody, but I certainly think that most people really felt a fondness by for Joe. And Joe was talked to by everybody. I'm going to characterize this in terms of, you know, perhaps more lighthearted than it really was. But they would say things to Joe in passing about -- Joe would report that Ernie Pepples specifically had told him this is the dumbest project he ever seen; and that it was going to ruin the industry and certainly ruin Liggett.

Ernie Pepples was the general counsel of Brown & Williamson. I remember Ernie because Ernie and Joe were really close. Ernie Pepples, who was a buddy and colleague of Joe, would be freer to say that kind of thing to him than some of the others who were operating as counsel for the various companies.

Ernie Pepples and Joe were clearly good friends, and it was repeatedly said to me what Ernie was saying about this project, which, you know, Ernie Pepples described as ridiculous, ruinous, crazy. I say that with some authority because Ernie Pepples said that same thing to

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me.

Q. Did anyone else representing any other tobacco company discuss the XA project with you other than Mr. Pepples?

A. Discuss is probably the wrong adjective. Certainly I can recall that Alex Holtzman sort of said to me, you know, Alex was really, you know, sort of an aristocat, said sort of, you know, problems, not a discussion, just an adjective.

Alex did the health-related work, as I recall, for Philip Morris in those years, and I know that he's still around because -- at least I hope he is. I saw him on his shuttle not too long ago.

Q. I'm having a little trouble understanding this. Did Mr. Holtzman just come by you and say these words to you?

A. No. And these are hard things to sort of quantify in sort of this memory of a lot of things over time. But, you know, I talked with all of these people about a lot of subjects, and some would say, you know, someone, has Liggett abandoned XA yet, it's

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stupid, you know, words of that sort.

I mean, you know, I don't think that this is going to come as a surprise to anybody because this was a subject that everybody except the people at Liggett at least before, you know, it shut down the project, all thought of this project in the same way.

And some of them knew more about it than others from the time that the patent was published. I mean, that's when inquiries and conversations really began to occur, because, quite frankly, to the best of my knowledge, nobody knew, nobody knew anything about what Liggett was doing on this project except those involved prior to the publication of the patent.

Q. In addition to Mr. Pepples and Mr. Holtzman, did anyone else outside of Liggett comment in any fashion to you regarding the XA project?

A. You know, I can't say they or they didn't. I would hate to attribute something to somebody that, you know, didn't happen. You know, it could have happened with others.

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But the only two that I can remember, I can remember Ernie real well. I mean, I truly don't know how he's doing. But I certainly remember Alex.

Now, Alex was not really a discussion. It was more of a pejorative adjective. Ernie was a lot more specific, a lot more pointed.

Q. Did anyone representing another tobacco company or other defendant in this case express to you any threat of retaliation if Liggett did not abandon the XA?

A. You know, in that regard, you know, I wouldn't characterize Alex's comments in that regard, but I would certainly characterizes Ernie Pepples comments on more than one occasion exactly in that regard.

Q. Did Mr. Pepples threaten any specific acts of retaliation to you?

A. Well, I mean, the comments, you know, were, you know, ruinous for the industry, and it would certainly ruin Liggett. You know, Liggett will not escape. You know, Liggett will not escape. And it was -- I mean, there was no question that the implication of what

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Ernie was saying is there would be no more Liggett.

Q. Did you explore that with him and ask him what he meant?

A. No, we didn't have it. It was pretty clear.

Q. You knew what he meant?

A. I knew Brown & Williamson threatened its very existence if it marketed ot tried to market the cigarette.

Q. Did Mr. Greer describe to you any threats that he had received from any other member of the industry?

A. I think I answered that, but my memory is clear on that. In fact, I saw it in Joe's notes. Joe kept very confidential group of notes that were part of the group of documents he sent me.

I mean, I knew they were there because I looked generally at what was there. And Joe, in those notes, if they still exist, will note, you know, heard from Pepples, you know. Quote, bury us, you know.

And as I tried to explain, you know, this

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wasn't -- you know, this wasn't monsters talking. You know, this wasn't, We are going to kill you. These are guys who were colleagues and worked together talking about a subject of what, you know, Ernie thought he could say to his friend, Joe.

Joe, this is the dumbest thing I ever heard. And this is what Joe reported back to me. Ernie, on more than one occasion, would take him to task for the fact that he hadn't killed the project.

I mean, remember, Joe Greer -- I don't know where Joe was where this project started. He may have been at Liggett, he may not. I don't think he was. This project ended up on his desk one day, and Joe told me twenty times if he told me once this was the hot potato of all time.

Q. Do you recall specifically that the words bury us were used?

A. Absolutely.

Q. Within the Liggett management circle you described as being interested in the XA project, to whom did that management group look

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for advice with regard to whether federal regulatory obstacles couldn't be overcome?

A. I guess they looked to me, but that doesn't mean they took my advice.

Q. Did you make an approach to the FTC other than an informal context?

A. No.

Q. Why?

A. I was specifically instructed not to.

Q. Who instructed you?

A. Mr. Greer.

Q. Do you recall approximately when he instructed you?

A. Sometime after December of '78. I honest -- honestly, somewhere in this document we can find the answer to that because there was a meeting -- there was a meeting in New York between --

Q. Just a moment. How could you find the answer to that?

A. Totally unrehearsed, you know, totally unrehearsed depositions are always ugly, aren't they?

There was a meeting in New York, the date

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when the project was certainly shelved for purposes of approaching the FTC. That was a meeting that took place in Webster Sheffield's office in New York in Rockefeller Center, which would be a meeting where Greer, monthly, I think K.V. Dey, Hooker, Hoagland and Cohn and maybe Bowen Ross were present. I was not present.

Q. Why were you not present?

A. Because I wasn't invited.

Q. Was it explained to you why you weren't invited?

A. I think the meeting was to ratify a decision that had been made in a number of conversations to shelve the project, and they knew -- they knew that I would just simply repeat what I had been speaking to them about and, you know, it would have been pointless.

Q. Who at Liggett management wanted to shelve the project?

A. Certainly Mr. Dey, certainly Mr. Greer at that stage.

Q. Who wanted to go forward with the project?

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A. It was my understanding that Mr. Seidensticker, you know, still thought that the project was viable. Certainly Mr. Ross, who had served on the project as patent lawyers and counsel to the group did.

I don't know where Mr. Sloat was at that point in time. I think he had then been replaced, but he certainly was champion of this project or champion of this healthcare niche while he was there.

But I can't tell you, I can't tell you more precisely than that.

Q. In the discussions of the XA project, was the possible return to the Liggett shareholders that were discussed returned based on marketing the XA?

A. Oh, quite often, because one of the -- you know --

Q. What was said in that regard?

A. Bowen Ross would often comment to me and to Joe that, you know, any efforts to diminish this project, you know, would be incorrect as a matter of corporate law because the shareholders had an enormous stake in its

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outcome.
If he said that to me once or twice, he said it to me twenty times over the course of this. He felt very strongly about continuing this project.
Q. Was there ever a discussion among the Liggett Group dealing with the XA project as to whether the possible return to shareholders of marketing the XA exceeded the risk to shareholders of litigation concerning their earlier products?
A. I can't -- I can't respond to that. I don't know the answer to that.
Q. Was the Liggett management circle that was working on the XA concerned about litigation regarding its other products?
A. Oh, absolutely.
Q. Did Mr. Greer ever explain to you what caused him to decide that Liggett should not go forward with the XA?
A. Sure.
Q. What did he say?
A. Well, on several occasions he explained, you know, with some elaboration the

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fact that, notwithstanding everything we said about the project and -- on the one hand and, on the other hand, discussion that I had with him repeatedly that, you know, that Liggett would not be able to participate, Liggett would not be able to participate, you know, successfully in this industry or to defend itself if it went forward with the XA project.

And he further elaborated that, you know, comments like Pepples, you know, made to him on occasion were that they would be denied access to any common defense in the industry; he would not be able to participate in the joint defense because the industry could have nothing to do with a company that weakened, weakened the industry position to the extent we are talking about in this document.

Q. Did he identify who, if anyone, told him that Liggett could not participate in a common defense if they went out with the XA project?

A. Well, I know that Joel said that repeatedly.

Q. Did he identify anyone who had said

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that to him?
A. I think I would have to answer the question the same way I answered it specifically. I know that Ernie Pepples spoke to him about this subject in connection with the others.
He may very well -- and I say this because it is my best recollection, but it is not perfect, that he also had a discussion with Bill Shinn about this subject. The Shook Hardy people were -- really viewed as the Rolls Royce lawyers when it came to industry defense.
And whenever there was an issue like this, there was always great deference to what the Shook Hardy layers said, whether it be David Hardy, Bill Shinn or somebody else.
And the Shook Hardy lawyers had in the past made some statements about the effect of the admissions against interest that research projects might entail.
Q. Did Mr. Greer explain to you why he feared that his file in the XA project could compromise Liggett? This is in Paragraph 23 of the proffer?

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A. Yes.
Q. What did he explain to you that his fear was; in other words -- strike that. How --
A. I can't answer that question simply.
Q. How did he feel that file compromised Liggett?
A. I can't answer that question simply. Let me say this, Bowen Ross who reported to Mr. Hooker directly and not to Mr. Greer because he was a patent lawyer for the company, broader terms than tobacco, Bowen Ross from the very first time I met him, you know, was a firm believer that, if Liggett, either on its own or as a result of succumbing to any pressure, did not bring this product to market, it would be wrong.
And if he said that to me once, he said it to me twenty-five times over the years. Bone took great offense to Mr. Greer's decision and to Mr. Greer's involvement.
Mr. Greer was dying of cancer. Remember, this happens after this event by some years. I mean, we are talking about a time frame of

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October 1977 on this memorandum and, you know, December of '78 on some of the others.

We are in the '77 to '78 time frame. I can't tell you when Joel got cancer, but I believe it to be about '83 or maybe late '82, early '84. Mr. Greer thought that this file that he sent me would show that the project was a substantial project that Liggett abandoned, and abandoned because of pressure such as I described in the Pepples conversation.

And he was afraid that Josiah Murray, who was not his selection as a successor, or Mr. Ross or others who would embarrass him or embarrass his widow and his son and possibly worse with these materials.

And that's why he sent them to me.

Q. Did Liggett abandon the XA project because of pressure from competitors?

A. Mr. Greer thought so. Mr. Greer thought so. That's what he communicated to me.

Q. Can you recall, as specifically as possible, please, the precise words that Mr. Greer used to you in conveying his belief that Liggett abandoned the XA because of

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pressure from competitors?
A. My best recollection would be words to the effect of what you just said. That, laddy, you know, we killed this project because of what we thought the industry would do to us. But specifically, you know, some of the companies in the industry would do to us.
Again, that came up in a couple of contexts, you know, different than simply at the time and simply different from the time he sent me the files and prior to his death.
Q. At the time Liggett decided to not go forward with the XA project, was the XA ready to be marketed?
A. Well, you know, put it this way. I think -- I think, had the commission, contrary to my judgment, said, you know, hey, guys, go, they had, you know, substantial inventories of palladium, they had substantial inventories of tobacco ready to be treated, they had substantial inventories of treated tobacco, and yes, it could have gone forward.
What kind of production they would have done, I don't know the answer to it. But

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certainly they had really gotten ready to produce. They had created a cigarette that they had tested for taste.

The guys who were really, you know, active cigarette smokers were all, you know, just beside themselves on the fact that, you know, the smokers that they had talked to couldn't distinguish between the project cigarette Epic and a Marlboro and that, because it's sort of the standard to taste for smokers.

I am not a smoker. I have never been a smoker. Yes, I smoked a cigarette because I wanted to see if it tasted as bad as I thought it might. And it tasted the same as other cigarettes. I don't smoke.

(End of video)

MR. KLEIN: Your Honor, may I explain to the jury what we will be doing?

THE COURT: That would be fine.

MR. KLEIN: Ladies and gentlemen, what you just heard was a desposition of Mr. Meyer that was taken on September 8th, 1998, and that was on videotape. Two months later, on November 10th, 1998, Mr. Meyer

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testified at trial in a case in the State of Washington.

And I'm going to read to you, with Mr. Gaddes, the testimony that was taken of him, the cross-examination of him at trial, no videotape because you are not allowed to have cameras in the courtroom.

THE COURT: Fine.

Q. My name is can Webb, and I represent Philip Morris in this case. I want to ask you some questions about your testimony. I'm going to ask you some specific questions about this XA project, what it was, what it wasn't.

Now, Liggett, in testing the XA cigarette to determine if it would form more or less tumors than standard commercial cigarettes, Liggett tested the XA cigarette with mice in what were called mice skin painting tests; is that correct?

A. Yes.

Q. And Liggett was well aware, was it not, that you cannot extrapolate or apply mouse tests to be predictive of the effect on humans; is that correct?

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A. That was their belief, yes.
Q. In fact, am I correct, you yourself actually advised Liggett as their lawyer that Liggett could not extrapolate mouse test results from the XA cigarette to predict what smoking XA cigarettes -- what effect it would have on humans. You advised them of that, didn't you?
A. Yes, I did.
Q. Because you believe that was the right thing to do, didn't you?
A. Yes.
Q. By the way, you are not a scientist; is that correct?
A. Not a scientist.
Q. You don't have a scientific background?
A. I was a math and physics major in college, that's it.
Q. I take it you are not professing to have any expertise on how to design a cigarette product to make it a safer product, are you?
A. I'm certainly not.
Q. Liggett did not do any epidemiology

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studies on the XA cigarette, did they?
A. We had no opportunity to do that.
Q. Didn't even plan it?
A. I think that's right.
Q. At the time you were advising them on the safe -- on this product, you yourself were aware that Liggett had no basis to contend that, in fact, these cigarettes were safer in humans; is that fair to say?
A. That was the case, yes.
Q. All I'm asking is: You yourself were not aware of any evidence that would support that, in fact, XA was a safer cigarette when smoked by humans?
A. That's right.
Q. But just at this point, to summarize it, what you were referring to there is that you were aware in representing Liggett that this product, this XA product, was actually using a technology that added nitrates into the tobacco; and that, when Liggett added nitrates into the tobacco, Liggett was increasing what are known as oxides of nitrogen, which lead to the development of what are known as

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nitrosamines.

I'm sorry, could you help me there. You were aware that it could lead to nitrosamines, which are a very dangerous carcinogenic product in cigarettes; is that correct?

A. That's my understanding.

Q. So you were telling Liggett they might have to disclose if, they start making one health claim or even an implied health claim, that they have to come back and say, look, this product may reduce tumors on the backs of mice, but it may also harm you because it has increased nitrosamines or oxides of nitrogen. You were telling them they may have to disclose that?

A. Well, in fact, we did disclose that. I don't know if I said it as carefully as I recall, but in describing this ad this morning or whenever that was, we talked about the fact that the process, the process we were using added palladium salts and nitric salts, which were then reduced to the level of conventional cigarettes through specialized filters.

It was not the kind of bold disclosure

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that might have been applied there, but it was certainly a disclosure that, when you were reading this, you were aware that nitrates had been added; and that was problematical.

Q. It was your belief back at that time period, 1978 and 1979, and somewhat familiar with the FTC -- it was your opinion, was it not, that there was going to be some major difficulties that would be experienced by Liggett in trying to convince the FTC that Liggett should be allowed to go forward with any kind of marketing activities regarding this product. Is that fair to say?

A. Yes.

Q. But am I correct, you accepted the materials given you to by your client that were put into this book to give to the Federal Trade Commission; you accepted that as a fair and accurate representation of the technology of this product. Is that correct?

A. Yes.

Q. And during the time period when you were having these informal contacts with the Federal Trade Commission, do you recall some

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occasions when Mr. Greer, the general counsel of Liggett, the person you told us became your friend, when Mr. Greer would periodically tell you that there were actually scientists inside the company that had been working on this XA project that were now raising real issues as to whether or not some of the things that Liggett wanted to claim about this product as being unique, in fact, were not unique?

A. Yes.

Q. And when Mr. Greer told you that there now were some scientists inside the company that were questioning whether or not this product was really what it was patented to be, did he tell you that what the scientists were raising is a concern that, in fact, this product, as it turned out, did not even reduce PAHs any lower than other cigarettes already being sold in the marketplace in the United States?

A. I recall one scientist of that view. There may have been more. But certainly I recall at the time that -- and Mr. Greer seized on this because Mr. Greer was looking for, if

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you will, the negative as well as the positive.

Certainly someone -- I can't remember whether it was Velo Norman or Bryant, but one of them were -- had become fearful that your premises; that, in fact, the cigarette didn't produce PCHs any more than other cigarettes was a problem.

Q. So this scientist at Liggett is saying right here very clearly that the level of PAH for the palladium XA cigarette is no different than commercial filtered cigarettes?

A. That's right.

Q. He is saying here, as soon as we put this product out, people will check out the PAHs and find out it's a fraud?

A. That's what he is saying.

Q. What the scientist is saying in this document is that this company, Liggett, patented this product of lower PAHs, was telling the scientific community that PAHs were lowering carcinogenicity, and this scientist says, if we continue to say that, it's a fraud; that's what he's saying here, isn't it?

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A. That's not an unfair conclusion as to what he is saying in the bulk of this memorandum.
Q. And you certainly were not aware of that?
A. I was not.
Q. Your client did not give the FTC a bar chart to compare the PAH level of its cigarettes to the other commercial cigarettes, did it?
A. Not in this paper.
Q. I will end this line of questioning, but you don't need to be a scientist to at least understand, as I look at these bar charts, that you do agree that your client should have included a bar chart that compared the PAH levels; do you not?
A. Based on this discussion, I would like to see the same bar chart presentation for PAH, for PCHs also presented here.
Q. Thank you. And it's not there.
A. No.
Q. Now, palladium is one of the constituents that Liggett was adding to tobacco

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or spraying it on the tobacco as part of the XA technology; is that correct?

A. Yes.

Q. And you noticed that palladium is a heavy metal that is actually extracted from platinum; is that correct?

A. I think that's right.

Q. We find it used, for example, in industries such as the jewelry industry is one; is that correct?

A. Yes.

Q. And you were aware that palladium is toxic to humans; is that correct?

A. Yes.

Q. And you were aware that palladium has been identified by the scientific community as carcinogenitic, meaning that it can cause cancer in humans; is that correct?

A. Yes.

Q. And you are aware and were aware back in 1978 and '9 that there were people in the public health community that believe that you simply don't add a toxic chemical to cigarettes when that chemical is a carcinogen. You were

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aware of that view?
A. I think so, yes.
Q. Common sense tells you, if you take a cigarette product that is viewed already by the public health community as having major health problems, if you decide to take that product that already has problems and put another product that is toxic and causes cancer, that will cause people to pause and hesitate, wouldn't it?
A. Certainly it gave me pause.
Q. You actually advised Liggett that, as far as using this heavy metal palladium, that Liggett had to be careful with this XA project because it could be alleged that the XA was more dangerous than other commercial cigarettes because of unforeseen consequences from the addition of palladium. Did you tell Liggett that?
A. You are probably reading what I said, but I certainly said that repeatedly, yes. I felt that very strongly.
Q. So the jury understands, the problem was that, because palladium is toxic and causes

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cancer, one of the problems that Liggett tried to deal with was to be sure that the added palladium, this thing they added in, palladium into the tobacco, spraying it on, that it did not seep, transfer into the smoke that smokers inhale into their lungs. Is that correct?

A. That's probably a fair way of saying it, yes.

Q. In fact, I think you told us on Tuesday that Liggett added about one ounce of palladium to every cigarette?

A. I'm obviously way off on that, but the fact is, whatever they added, whatever they added -- I think the number was -- we are talking about millions of parts -- it was sprayed on.

Let me say this. When I started raising the very issue you are talking about, without anything else having been said, they assured me that there would be absolutely no difference in the palladium treated cigarette and regular cigarettes in terms of palladium residual.

I didn't believe it. I said we needed to test it. We couldn't possibly go on that. And

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that's the starting of all this testing done by A. D. Little and the Southwest Institute.

Don't hold me if I said an ounce per cigarette. Obviously it's a great mistake. Certainly it was just minute parts of palladium for the process. But that didn't matter.

We are talking about adding a toxic metal. We have the same concerns whether adding a little or a lot.

Q. Fine. Correct the answer. I accept that. No problem.

Here is the question: Whatever amount of palladium they were adding, you were concerned it could be a problem?

A. I felt that very strongly.

Q. Did you ask them? Have you already done testing before you asked me to go to the FTC, Mr. Meyer; before you asked me to go to the FTC, have you, Liggett, done new testing to see if, in fact, that palladium is seeping into or transferring into the smoke that's being inhaled or would be inhaled into people's lungs?

A. If they had done any testing, it

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wasn't persuasive. I think when I started raising these issues is when they started doing the inhalation tests we are talking about.

Q. Do you know whether they had done any testing as of the time that you began to represent Liggett on this XA project; had they already done testing to find out one way or the other whether palladium, in fact, transferred into the smoke or whether, in fact, it didn't transfer into the smoke during the burning of the cigarette?

A. Actually I don't think so, but I don't remember. I don't think they had.

Q. This letter from the gentleman, James D. Mold, his title here is Assistant Director. Do you see that?

A. Yes. In '75.

Q. Do you think he became director later. You are not sure. I understand that. Is that correct; you are not sure?

A. Yes.

Q. He clearly was a major participant in this XA project on behalf of Liggett as a research scientist. Is that correct?

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A. Yes.
Q. Is he the research scientist you had the most contact with as far as the XA project was concerned?
A. Yes.
Q. Now, he says:
Dear Paul, We have completed our evaluation of the transfer of palladium into smoke. The amount found for 131 cigarettes containing palladium at .05 percent was .01 UG cigarette. This would be further reduced by filtration to about .07 UG cigarette.
Do you see that?
A. Yes.
Q. Am I correct this letter shows at least -- not getting into how dangerous it is, this letter shows that palladium is transferring into the smoke?
A. Right. And just to clarify my earlier answer, I had thought you asked me whether or not they had done any testing. I did not consider any of this stuff that was done in house by them to be the testing you were referring to. I didn't think it was

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adequate.

I see they had done this and I remember this from my deposition. But this was not the kind of testing that I thought we ought to engage in, that being outside testing accomplished by --

Q. You agree this letter would tend to show you by the time you became involved with the XA project, your client already knew, already knew that the palladium at least does transfer in some amount into the smoke?

A. Absolutely, yes.

Q. And was this disclosed to the Federal Trade Commission, this letter?

A. This letter wasn't in the packet but certainly, I say this very honestly, in my informal discussions with the trade commission guys and ladies, I made it clear one of the things we were waiting for was inhalation testing on the palladium additives.

Because when I described this very informally about an exciting process, I said we were awaiting testing which obviously would be part of the discussion.

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So to me, when we are talking about the need for inhalation testing to see if there is any residuals of palladium in the exposed mice, clearly that sort of an admission by the very fact what we are doing, I doubt that this is in the book.

Q. I will get to that before we get to the inhalation study. The first issue is whether the palladium in fact transfers into the smoke as opposed to not transferring into the smoke. Do you understand the question?

A. Yes.

Q. This document shows that at least Liggett knew at the time that you became involved that some palladium does transfer into the smoke that would be ingested if people smoked the product?

A. Yes.

Q. At the time Liggett was talking to you about going to the FTC, you at least were aware that the materials that were in this book did not yet fully address the issue as to whether or not there would be any danger to humans if they smoked a palladium cigarette and

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ingested some palladium into their lungs. That question had not been answered at that point?

A. That's right.

Q. I'm going to move -- I will move to nitrates. Besides palladium, the other constituent that the XA technology added to the tobacco are what we called nitrates; is that correct?

A. Yes.

Q. Liggett -- besides the palladium, Liggett added the constituent called nitrate into the tobacco; isn't that correct?

A. Right. As part of magnesium nitrate as I understand it.

Q. Nitrates were actually added into the palladium technology. Ignore my spelling: My worst nightmare.

Nitrates were added in two forms. Tell me if I'm correct. Liggett experimented with using a high Burley tobacco that had a high level of nitrates in and of itself, and then added in additional nitrates. Is that correct?

A. Put it this way. They either used the tobacco that was high in nitrates and maybe

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even added supplemental nitrates to that, or added more nitrates to nonhigh nitrate tobacco.

Q. We are saying the same thing.

Now, when you began to work on the XA project early on, you became aware that when a cigarette manufacturer starts to develop a new cigarette product by adding nitrates into the product, that that did create some potential serious health problems. Is that fair to say?

A. Yes.

Q. Explain that to the jury. The jury heard a Dr. Farone testify last week, and I want to make sure you and I are on the same page. The problem with adding nitrates is that nitrates, when the cigarette burns, when that cigarette burns, the nitrates free oxides of nitrogen; is that right?

A. Yes.

Q. Now, the problem with that is the oxides of nitrogen interact with the alkaloids in the cigarette and they create nitrosamines. Is that correct?

A. Yes. And pronounced correctly too.

Q. Thank you. It's a miracle. I forgot

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the name the other day.

And the problem with nitrosamines are that nitrosamines are very carcinogenic; is that correct?

A. That's my understanding.

Q. That means they can cause cancer; isn't that correct?

A. Yes.

Q. So the -- did Liggett tell you by the time you became involved in this project in 1978 that the scientific community had identified nitrosamines as the single most dangerous constituent of cigarette smoke?

A. I don't know. I mean, I don't know whether Liggett told me that, but I certainly was aware of adding nitrates was a problem.

Q. My question was did you come to learn, not only was it a problem, but the presence of nitrosamines was the single most dangerous constituent of cigarette smoke, or did Liggett tell you that, if you know?

A. Put that way, as I discussed, I wanted them to affirmatively disclose the fact they added nitrate. There were reasons for

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that. I don't know whether they went to knowing that about -- knowing nitrosamines that specifically, but certainly I knew it was a problem.

Q. So this cigarette that your client said that they might have to go see the FTC about appears now to be high in nitrosamines at least according to that chart?

A. Right.

Q. And according to the memo this morning was no different in PAHs than other commercial cigarettes?

A. Based on this fellow who I do not know's memo, that's right.

Q. In this courtroom, as you see this unfold, does that -- does this cause you as a lawyer to say maybe the XA project was not what it was cracked up to be?

A. I'm the fellow who basically shot down all the ads, wanted them to disclose nitrates, wanted us to start a dialogue before we promoted it at all, wanted to make sure what we were saying was accurate. It doesn't change my view of what I felt in 1978.

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What changes my view was the fact that the nitric piece, the nitric oxide piece might be relatively more important than it was explained back in '78.

Q. Let me return to the issue of the other problem of nitrates. We will go back to our chart.

So the jury understands what happened at Liggett is that Liggett -- am I correct, when you started working on this project, Liggett was very much aware that if it did not solve the nitrate problem, it was not going to be putting this cigarette into the marketplace? Is that a fair statement?

A. If it did not reduce the nitrates that were higher because they had added nitrates, the product probably would not have been marketable, yes.

Q. Your understanding is that they were trying to lower the extra nitrate they had to add in?

A. Right. There is no question that's right.

Q. What they found out is that by not

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adding in the extra nitrate, this product did not work?

A. Absolutely did not work.

Q. Didn't reduce the tumors in the backs of those mice at all compared to commercial cigarettes?

A. That's my understanding.

Q. And then Liggett had a problem. So it went back and it did a third mouse skin painting test, and a fourth mouse skin painting test.

And what it found out from those last two tests is that it could not make the product work, even on mice, without keeping the nitrate level, the added nitrate level, at a higher amount. Is that correct?

A. I think that's right.

Q. You were aware at the time you were getting ready to go to the FTC that those mouse skin painting tests wouldn't even tell Liggett whether or not the nitrosamines would cause additional tumors in mice?

A. No, I wasn't.

Q. That was not disclosed, that was not

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disclosed in this document that was put together to give to the FTC?

A. Well, I wouldn't think so, no.

Q. I take it that as a lawyer, you did not want to be part of any plan to get the FTC to allow Liggett to market a cigarette that in fact would be more dangerous for people?

A. I wanted to do exactly the opposite. I wanted to make sure that before this product went to market, everybody had a shot at it.

Q. Let's see what this scientist concludes on the next page. This Liggett scientist, Dr. Wallick, says: All of these references point toward the desirability of reducing the levels of nitrate in tobacco intended for a smoking product.

Do you see that?

A. Sure.

Q. And that's the exact opposite of the XA cigarette?

A. Well, as you pointed out, the XA doesn't work unless you add nitrate.

Q. So this is the exact opposite?

A. Yes.

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Q. He goes on to say: And I believe we should give serious thought to the ramifications of introducing such a product?
A. Yes.
Q. You did not know that back in 1978 when you were going to go to the FTC, did you?
A. I did not know.
Q. You did not know -- strike that question.
Back in 1978 when you were going to go to the FTC, you were aware -- excuse me -- were you aware of any Liggett scientist that was suggesting that it's crazy to increase nitrates, we should be going in the other direction?
A. No. I certainly wasn't aware of it.
Q. Now, we saw that one memo, so the jury understands, the problem with adding nitrates doesn't stop with NO oxides of nitrogen. Adding nitrates also increases nitrogen dioxide; correct?
A. Yes.
Q. And you were aware -- excuse me.
And you were aware when you were -- when

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you were working on this project, you were aware that nitrogen dioxide is very toxic and can cause cancer?

A. Probably.

Q. Do you recall when you were working on this XA project that when Liggett decided to develop a filter that would try to address the nitrate problem, that the filter it eventually developed had cobalt in it?

A. I remember a discussion of that.

Q. And do you remember a discussion that cobalt itself is another toxic substance?

A. Yes. I remember that.

Q. In fact, do you remember that the Liggett patent, the patent we looked at where Liggett had developed the XA technology, the patent stated on its face that cobalt was too toxic and not recommended to be used in the XA technology?

A. I remember that.

Q. Did it strike you as odd that Liggett in trying to solve a nitrate problem then added cobalt into the product which the patent said was too toxic?

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A. Well, it didn't strike me as odd because remember the patent is based on the addition of another toxic metal, and that is palladium.

In other words, if it takes that kind of catalytic activity in order to achieve a result, it didn't surprise me. But it underscored once more the importance of this inhalation testing and any other testing that might have been engulfed in.

Q. By the way, all that material you were going to take to the FTC, did Liggett do any testing on the cobalt filter, do you know?

A. No.

Q. Now, what developed is we get to like 1978 and into 1979. Mr. Greer came to more and more believe that the regulatory environment in the United States was so hostile that it presented some significant legal risks if Liggett decided to market this product. Is that fair to say?

A. Yes.

Q. He was also concerned because the FTC problem -- he was concerned about civil

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lawsuits. Is that correct?
A. Yes.
Q. So once the patent was filed, anyone that wanted to understand design and technology of the XA cigarette could do so by reading this patent that I showed you in this courtroom?
A. Yes, that's right.
Q. So let me just ask you. From 1997 up till today, are you aware of anybody in government or any public health agency or any scientist outside of Liggett that has ever supported the concept that the XA product was a safer cigarette that should have been marketed and sold in the United States to smokers?
A. Just so I'm clear, are you including like a Charlie Kensler and A. D. Little on that?
Q. No. Little was a contractor of Liggett; is that correct?
A. Just to be sure, because I view him outside that scope. If you include the A. D. Little in that, not that I'm aware of.
Q. For example, you were not aware of anyone from the National Cancer Institute that

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supported that concept?
A. Only informally, and we were encouraged privately in meetings, that's all.
Q. Did they ever say they were going to support it to be introduced into the marketplace?
A. I think I have testified to that in my deposition. The only thing I ever heard from anybody in the national cancer side was that Kensler was encouraged by what Gori, Gio Gori, had said to him, but no public announcements.
Q. And Liggett didn't finance the million dollars for testing?
A. That's right.
Q. Did anyone tell you from the Surgeon General's office of the United States?
A. I don't think so.
Q. How about the Federal Trade Commission?
A. No one said anything publicly.
Q. The Food and Drug Administration?
A. I don't know, but I don't think so.
Q. Any other federal government health

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agency that you know of ever stated that they would support this product being put into the marketplace?

A. I don't believe so.

Q. Did you ever hear any state public health agency or any of our 50 states ever say that they would support this technology to be introduced as a safer cigarette?

A. No, I don't think so.

Q. How about the American Heart Association?

A. Same answer.

Q. American Lung Association?

A. Same answer.

Q. American Medical Association?

A. Same answer.

Q. American Cancer Society?

A. Same answer.

Q. Let's take it one step further. This patent, once it went into the market or once the patent was issued in 1997, for 17 years Liggett received patent protection so that no one else could take their idea, their technology, and manufacture and sell a product

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that used the XA design and technology; is that correct?

A. Well, at least that long. I don't know whether some of the related patents extended beyond 1994 or not, but certainly for that long. And the answer is yes.

Q. This one at least, '77, would have expired in '94?

A. That's right.

Q. So that means that at least for the last four years since 1994, if Liggett's patent of this XA product, if another tobacco company wanted to take this technology and develop a safer cigarette and put it into the marketplace, they could try to do so after 1994?

A. I think that is arguably right.

MR. KLEIN: Your Honor, that completes the reading.

THE COURT: All right. Does that conclude the presentation of the Meyer testimony?

MR. SEGAL: It does, Your Honor. And our next testimony takes 16 minutes, not one minute, so it won't work.

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THE COURT: So let's go ahead and take the noon break now, come back here at 1:00. Please don't discuss the case among yourselves nor permit anyone to discuss it with you. See you back here at 1:00.

(A luncheon recess is taken at 11:57 a.m.)

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